ACADEMIC LEGAL WRITING:

LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW

by

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with foreword by

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I. ARTICLES AND STUDENT NOTES: THE BASICS

A. The Initial Step: Choosing a Claim

Good legal scholarship should make (1) a claim that is (2) novel, (3) nonobvious, (4) useful, (5) sound, and (6) seen by the reader to be novel, nonobvious, useful, and sound.*

This is true whether the author is a student, a young lawyer, a seasoned expert, or an academic. I will sometimes allude below to student authors (since I expect that most readers of this book will be students), for instance by discussing grades or faculty advisors. But nearly all of this book should apply equally to other aspiring academic writers.

1. The claim

a. Your basic thesis

Most good works of original scholarship have a basic thesis—a claim they are making about the world. This could be a *descriptive* claim about the world as it is or as it was (such as a historical assertion, a claim about a law's effects, a statement about how courts are interpreting a law, or the like). It could be a *prescriptive* claim about what should be done (how a law or a constitutional provision should be interpreted, what new statute should be enacted, how a statute or a common-law rule should be changed, or the like). It could also be a combination of both a descriptive claim and a prescriptive one. In any case, you should be able to condense that claim into one sentence, for instance:

1. "Law X is unconstitutional because ...."
2. "The legislature ought to enact the following statute: ...."
3. "Properly interpreted, this statute means ...."
4. "This law is likely to have the following side effects ...."
5. "This law is likely to have the following side effects ..., and therefore should be rejected or modified to say ...."
6. "Courts have interpreted the statute in the following ways ...,

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* I am indebted for much of this formulation to Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 Yale L.J. 2065, 2083 (1991).

and therefore the statute should be amended as follows ...."

7. "Several different legal rules are actually inconsistent in certain ways, and this inconsistency should lead us to ...."
8. "My empirical research shows that this legal rule has unexpectedly led to ..., and it should therefore be changed this way ...."
9. "My empirical research shows that this law has had the following good effects ..., and should therefore be kept, or extended to other jurisdictions."
10. "Viewing this law from a [feminist/Catholic/economic] perspective leads us to conclude that the law is flawed, and should be changed this way ...."
11. "Conventional wisdom that ... is wrong, because ...."

So a few examples:

1. "The ban on paying for organs to be transplanted violates patients' constitutional rights to defend their lives." This fits in genre #1 discussed above.
2. "Punishing citizens for failing to report crimes that they observe may sometimes discourage reporting, because people who fail to report promptly will realize they've committed a crime and will thus be reluctant to talk to the police later." Genre #4.
3. "Courts often favor the more religious parent over the less religious parent in child custody decisions, and this violates the Establishment Clause." Genre #8, because it contains a potentially novel descriptive claim (about what courts do) as well as a prescriptive claim.
4. "Though many people assume that liberal Justices have broader views of free speech than conservative Justices, it turns out that Justice Kennedy has the broadest view of free speech, Justice Breyer has the narrowest, and the other Justices fall in between without a clear liberal-conservative pattern." Genre #11.

Capturing your point in a single sentence helps you focus your discussion, and helps you communicate your core point to the readers. Moreover, many readers will remember only one sentence about your article (especially if they only read the Introduction, as many readers do). You need to understand what you want that sentence to be, so you can frame your article in a way that will help readers absorb your main point.

b. The descriptive and the prescriptive parts of the thesis

The most interesting claims are often ones that combine the descriptive and the prescriptive, telling readers something they didn't know about the world—whether it's about what courts have done, how a legal rule changes people's behavior, or why a rule has developed in a particular way—but also suggesting what should be done. The descriptive is valuable because many people are more persuadable by novel facts than by novel moral or legal arguments. The prescriptive is valuable because it answers the inevitable "so what?" question that many practical-minded readers will ask whenever they hear a factual description, even an interesting one.

You can certainly write an article that's purely prescriptive or purely descriptive (though see Part I.A.8.d, p. 36 for a discussion of one sort of descriptive piece that you might want to avoid). Combining the prescriptive and the descriptive, however, tends to yield a more interesting and impressive article. So, as you're developing your claim, try to look both for novel, nonobvious, useful, and sound descriptive assertions and for novel, nonobvious, useful, and sound prescriptions.

Thus, for instance, say that you are writing about freedom of speech and hostile public accommodation harassment law, under which courts and administrative agencies award damages when proprietors of public accommodations allow speech that creates a racially, ethnically, religiously, or sexually hostile environment for some patrons. You could just use First Amendment precedents and First Amendment theory to analyze the hostile public accommodation environment rules, and explain why they should be preserved, changed, or repealed (the prescriptive dimension).

But if you could find cases, including perhaps hard-to-discover administrative agency decisions, that show that there's a real problem, and that hostile public accommodations environment law is indeed restricting potentially valuable speech (the descriptive dimension), your argument would be stronger. It would better persuade readers that your proposal is useful, since many readers might otherwise be skeptical that there's a problem to be solved. It would help you more concretely present your prescriptive argument. And even if the readers disagree with, skim over, or forget your prescriptive argument, they might still find value in your novel descriptive observations—and give you credit for making these discoveries.

c. Identifying a problem

To get to a claim, you must first identify a problem, whether a doctrinal, empirical, or historical one, in a general area that interests you; the claim will then be your proposed solution to that problem. Some tips:

1. Think back on *cases you've read for class* that led you to think "this leaves an important question unresolved" or "the reasoning here is unpersuasive."
2. Try to recall *class discussions* that intrigued you but didn't yield a well-settled answer.
3. Read the *questions that many casebooks include* after each case; these questions often identify interesting unsolved problems. Look not just at the casebook that you used yourself, but also at other leading casebooks in the field.
4. Read *recent Supreme Court cases* in fields that interest you, and see whether they leave open major issues or create new ambiguities or uncertainties.
5. Ask *faculty members* which parts of their fields they think have been unduly neglected by scholars; some (though not all) of the professors you ask may even suggest specific problems.
6. Ask *practicing lawyers* which important unsettled questions they find themselves facing.
7. Check the *Westlaw Bulletin* (WLB), *Westlaw State Bulletin* (WSB-CA, WSB-NY, and such), and *Westlaw Topical Highlights* (WTH-CJ, WTH-IP, and such) databases. These databases summarize noteworthy recent cases, in one paragraph each; many such cases contain legal developments that might prove worth analyzing.
8. Read Heather Meeker's *Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers*, 1996 Utah L. Rev. 917.
9. Read *legal Weblogs that specialize in the field you're interested in*. Bloggers often post about interesting new cases that pose thorny, unresolved problems.
10. Think back on your *pre-law-school experience*, whether academic, professional, or personal. Can you tie interesting things you learned there to some legal question? For instance, did your undergraduate history classes teach you about some fascinating but underdiscussed past legal controversies? Do you know something about a foreign country that can help you do comparative law work dealing with the law of that country?

Look for a problem that's big enough to be important and interesting but small enough to be manageable.

d. Looking for claims when you're in class

If you're thinking ahead about writing an article a semester or two from now, look for claims when you're in class, especially a class you really enjoy. The key here is to face class like a scholar rather than like a normal law student.

Your coursework will often bring you up against ambiguity, vagueness, and contradiction, whether in cases, statutes, or constitutional provisions. You'll also read arguments that you realize are shallow, circular, or speculative.

The natural reaction for many lawyers and law students is to try to evade these problems. We pretend that a case announces a clear rule even though it's full of mushy terms that are often indeterminate in application. We learn the standard arguments, however conclusory they might be, so we can repeat them on the exam. We ignore the five different approaches courts have taken and instead just assume they fit in the "majority" and "minority" rules that the casebook gives you.

This approach may actually be good enough for succeeding (most of the time) in class, and even for succeeding in many tasks as a lawyer. Many cases that you'll face as a lawyer will involve only one of the several competing rules—the one that's well-settled in your jurisdiction—or will trigger a rule's clear core rather than its vague periphery. And even when a governing precedent is based on a circular argument, it's still the governing precedent, so the flaws in its justification often won't need to detain you.

But if you are a would-be scholar, even a temporary scholar who just wants to write an article or two while in law school, you should take a different approach. You should seek out ambiguity, vagueness, contradiction, glibness, circularity, and unsupported assumptions. They give you the opportunity to shine by doing better.

So if you find these flaws in the materials you're studying, look

more closely. Check the notes following the case to see if they point to articles discussing the flaws. Maybe those articles cover the field, but maybe they themselves are inadequate, and just give you more food for thought. Ask the professor whether he thinks the topic seems worth writing about, or whether it has already been done to death. And enjoy and focus closely on those discussions that other students view as most unsatisfying: They are the natural foundation for your own work.

e. Checking with your law school's faculty

Once you've tentatively chosen a problem, run it by your faculty advisor. Your advisor will probably know better than you do whether there's already too much written on the subject, or whether there's less substance to the problem than you might think.

Also talk to other faculty members at your school who teach in the field, even if you don't know them. Most are happy to spend a few minutes helping a student.

Even if you're no longer a student, you should still be able to draw on your law school's faculty: Professors feel some obligation to help alumni, especially those who they think will eventually try to go into teaching. If you feel uncomfortable approaching a faculty member whom you don't know, ask another professor whom you do know to introduce you (in person or electronically).

f. Keeping an open mind

Do your research with an open mind. Be willing to make whatever claims your reading and thinking lead you to.

Also be willing to change or refine the problem itself. Remember that your goal is to find whatever problem will yield the best article. Don't feel locked into a particular problem or solution just because it's the first one you thought of.

g. Identifying a tentative solution

Decide what seems to be the best solution to the problem. For the descriptive part of your claim, the best solution is just the most plausible explanation of the facts (facts about history, about the way the law has been applied, about the way people behave) that you've uncovered.

For the prescriptive part, the best solution could be a new statute, a new constitutional rule, a new common law rule, a new interpretation of a statute, a new enforcement practice, a novel application of a general principle to a certain kind of case, or the like. This will be your *claim*: "State legislatures should enact the following statute ...." "Courts should interpret this constitutional provision this way ...." "This law should be seen as unconstitutional in these cases ..., but constitutional in those ...."

Test your solution against several factual scenarios you've found in the cases, and against several other hypotheticals you can think up. Does the solution yield the results that you think are right? Does it seem determinate enough to be consistently applied by judges, juries, or executive officials? If the answer to either question is "no," change your solution to make it more correct and more clear. (I discuss this "test suite" process further in Part I.A.5, p. 21.)

The solution doesn't have to be perfect: It's fine to propose a rule even when you have misgivings about the results it will produce in a few unusual cases. But candidly testing your solution against the factual scenarios will tell you whether even you yourself find the solution plausible. If you don't, your readers won't, either.

2. Novelty

a. Adding to the body of professional knowledge

To be valuable, your article must be novel: It must say something that hasn't been said before by others. It's not enough for your ideas to be original to you, in the sense that you came up with them on your own—the article must add something to the state of expert knowledge about the field.

In practice, the best bet is to find a topic that has not been much written on. The second best option is to at least find a claim that hasn't been made before, even if many others have made other claims related to the topic. But if you really want to reach a conclusion that others have already covered (e.g., race-based affirmative action is or is not constitutional, the death penalty is or is not proper, and the like), that too could work: You just need to make sure that your claim coupled with your basic rationale is novel.

For instance, say you want to criticize obscenity law. Many people

have already argued that obscenity law is unconstitutional because it interferes with self-expression, or because it's too vague. You shouldn't write yet another article that makes the same point.

But a new test for what should constitute unprotected obscenity might be a novel proposal (and might even be useful, if you argue that state supreme courts should adopt it even if the U.S. Supreme Court doesn't, see Part I.A.4.b, p. 18). So would a proposal that obscenity law should be entirely unconstitutional, if you've come up with a novel *justification* for your claim: For instance, the claim that "obscenity laws are unsound because, as a study I've done shows, such laws are usually enforced primarily against gay pornography" may well be novel. (This claim and the others I mention below are just examples. I don't vouch for their correctness, or recommend that you write about them.)

What if you've chosen your topic and your basic rationale, and, four weeks into your research, you find that someone else has said the same thing? No need to despair yet.

b. Making novelty through nuance

Often you can make your claim novel by making it more nuanced. For instance, don't just say, "bans on nonmisleading commercial advertising should be unconstitutional," but say (perhaps) "bans on nonmisleading commercial advertising should be unconstitutional unless minors form a majority of the intended audience for the advertising." The more complex your claim, the more likely it is that no one has made it before. Of course, you should make sure that the claim is still (a) useful and (b) correct.

Some tips for making your claim more nuanced:

1. Think about what special factors—for instance, government interests or individual rights—are present in some situations covered by your claim but not in others. Could you modify your claim to consider these factors?
2. Think about your arguments in support of your claim. Do they work well in some cases but badly in others? Perhaps you should limit your claim accordingly.
3. For most legal questions, both the simple "yes" answer and the simple "no" tend to attract a lot of writing. See if you can come up with a plausible answer that's somewhere in between—"yes" in some cases, "no" in others.

3. Nonobviousness

Say Congress is considering a proposed federal cause of action for libel on the Internet. You want to argue that such a law wouldn't violate the First Amendment.

Your claim would be novel, but pretty obvious. Most people you discuss it with will say, "you're right, but I could have told you that myself." Libel law, if properly limited, has repeatedly been held to be constitutional, and many people have already argued that libel law should be the same in cyberspace as outside it. Unless you can explain how federal cyber-libel law differs from state libel law applied to cyberspace, your point will seem banal.

Claims such as that one, which just apply settled law or well-established arguments to slightly new fact patterns, tend to look obvious. Keep in mind that your article will generally be read by smart and often slightly arrogant readers (your professor, the law review editors, other people working in the field) who will be tempted to say "well, I could have thought of that if I'd only taken fifteen minutes"—even when that's not quite true.

You can avoid obviousness by adding some twist that most observers would not have thought of. For example, might a federal cyber-libel law be not just constitutional, but also more efficient, because it sets a uniform nationwide standard? Could it be more efficient in some situations but not others? Could it interact unexpectedly with some other federal laws? Making your claim more nuanced can make it less obvious as well as more novel.

If you can, describe your claim to a faculty member who works in the field (besides your advisor), an honest classmate who's willing to criticize your ideas, and a lawyer who works in the field. If they think it's obvious, either refine your claim, or, if you're confident that the claim is in fact not obvious, refine your presentation to better show the claim's unexpected aspects.

4. Utility

You'll be investing a lot of time in your article. You'll also want readers to invest time in reading it. It helps if the article is useful—if at least some readers can come away from it with something that they'll find professionally valuable. And the more readers can benefit from it,

the better.

a. Focus on issues left open

Say you think the U.S. Supreme Court's *Doe v. Roe* decision is wrong. You can write a brilliant piece about how the Court erred, and such an article might be useful to some academics. But *Doe* is the law, and unless the Court revisits the issue, few people will practically benefit from your insight.

You should ask yourself: How can I make my article more useful not just to radically minded scholars, but also to lawyers, judges, and scholars who aren't interested in challenging the existing Supreme Court caselaw here? One possibility is to identify questions that *Doe* left unresolved—or questions that it created—and explain how they should be resolved in light of *Doe*'s reasoning, along with the reasoning of several other Supreme Court cases in the field. Such an article would be useful to any lawyer, scholar, or judge who's considering a matter that involves one of these questions.

b. Apply your argument to other jurisdictions

Say *Doe* holds that a certain kind of police conduct doesn't violate the Fourth Amendment. This makes *Doe* binding precedent as to the Fourth Amendment, but only persuasive authority as to state constitutions, because courts can interpret state constitutions as providing more protection from state government actors than the federal constitution does.

The claim "state courts interpreting their own state constitutional protections should reach a different result" is therefore more useful than just "the Court got it wrong." Judges are more likely to accept the revised claim, lawyers are more likely to argue it, and academics are more likely to build on it. Your article will still be valuable to scholars who are willing to challenge the Court's case law, but it will also be valuable to many others.

c. Incorporate prescriptive implications of your descriptive findings

You can make a valuable contribution to knowledge just by uncover-

ing some important facts: historical facts, facts about how judges or other government officials are applying a law, facts about how people or organizations react to certain laws, and so on. But your contribution would be still more valuable, and more impressive, if your claim also said something about how these findings are relevant to modern debates. You could come up with your own prescription based on the findings, or you could just explain how your findings might be relevant to others' prescriptive arguments, even if you don't endorse those arguments yourself.

Practical-minded people who read a purely descriptive piece will often ask "so what?" If you answer this question for them, you'll increase the chances that they'll see your work as useful. Don't do this if it's too much of a stretch: If there are no clear modern implications of your findings about 14th century English property law, you're better off sticking just with your persuasive historical claims rather than adding an unpersuasive prescriptive claim. But if you see some possible prescriptive implications, work them in.

d. Consider making a more politically feasible proposal

Say your claim is quite radical, and you're sure that few people will accept it, no matter how effectively you argue. For instance, imagine you want to urge courts to apply strict scrutiny to restrictions on economic liberty—a step beyond *Lochner v. New York*. You may have a great argument for that, but courts probably won't be willing to adopt your theory.

Think about switching to a more modest claim. You might argue, for instance, that courts should apply strict scrutiny to restrictions on entering certain professions or businesses. This would be a less radical change, and you can also support it by using particular arguments that wouldn't work as well for the broader claim.

Maybe courts will still be unlikely to go that far. Can you argue for a lower (but still significant) level of scrutiny? Can you find precedents, perhaps under state constitutions, that support your theory, thus showing your critics that your theory is more workable than they might at first think?

Or perhaps you could limit your proposal to strict scrutiny for laws that interfere with the obligation of contracts, rather than for all economic restrictions. Here you have more support from the constitutional

text, a narrower (and thus less radical-seeming) claim, and perhaps even some more support from state cases: It turns out that state courts have interpreted the contracts clauses of many state constitutions more strictly than the federal clause.

If you really want to make the radical claim, go ahead—you might start a valuable academic debate, and perhaps might even eventually prevail. But, on balance, claims that call for modest changes to current doctrine tend to be more useful than radical claims, especially in articles by students or by junior practitioners. By making a more moderate claim, you can remain true to your basic moral judgment while producing something that's much more likely to influence people. Many legal campaigns are most effectively fought through small, incremental steps.

e. Make sure the argument doesn't unnecessarily alienate your audience

You should try to make your argument as appealing as possible to as many readers as possible. You can't please everyone, but you should avoid using rhetoric, examples, or jargon that unnecessarily alienates readers who might otherwise be persuadable.

For instance, say that you're writing an article on free speech, and in passing give anti-abortion speech as an example. If you call this "anti-choice" speech, your readers will likely assume that you bitterly oppose the anti-abortion position. Some pro-life readers might therefore become less receptive to your other, more important, arguments; and even some pro-choice readers may bristle at the term "anti-choice" because they see it as an attempt to make a political point through labeling rather than through argument. If you're pro-choice, imagine your reaction to an article that in passing calls your position "anti-life"—would this make you more or less open to the article's other messages?

Avoid this by using language that's as neutral as possible. Right now, for instance, "pro-choice" and "pro-life" seem to cause the fewest visceral reactions; most terms have some political message embedded in them, but these seem to have the least, perhaps because repeated use has largely drained them of their emotional content. But in any case, find something that is acceptable both to you and to most of your readers.

The same goes for terms like "gun lobby," "gun-grabber," "abortionist," "fanatic," and the like. You may feel these terms are accurate, but that's not enough. Many readers will condemn these terms as attempts to resolve the issue through emotion rather than logic, and will therefore become less open to your substantive arguments. Likewise, if you're analogizing some views or actions to those of Nazis, Stalinists, the Taliban, and the like, you're asking for trouble unless the analogy is extremely close.

Try also to avoid using jargon that will confuse those who are unfamiliar with it, or that will unnecessarily label your work (fairly or unfairly) as belonging to some controversial school of analysis. If you have to use the jargon because you need it to clearly explain your theory, that's fine. But if you're writing an article on a topic that doesn't really require you to use a specialized method such as law and economics, literary criticism, or feminist legal theory, then stay away from the terms characteristic of those disciplines. Replacing such terms with plain English will probably make your article clearer and more accessible, and will avoid bringing in the ideological connotations that some people associate with these terms.

Likewise, try to include some arguments or examples that broaden your article's political appeal. If you are making a seemingly conservative proposal, but you can persuasively argue that the proposal will help poor people, say so. If you are making a seemingly liberal proposal, but you can persuasively argue that the proposal fits with tradition or with the original meaning of the Constitution, say that.

You should of course be willing to make unpopular arguments, if you need them to support your claim; that's part of the scholar's job. And if you really want to engage in a particular side battle, you might choose to bring it up even if you don't strictly have to. But in general, don't weaken your core claim by picking unnecessary fights.

5. Soundness: prescriptive claims

a. Test suites

When you're making a prescriptive proposal (whether it's a new statute, an interpretation of a statute, a constitutional rule, a common-law rule, a regulation, or an enforcement guideline), it's often easy to get tunnel vision: You focus on the one situation that prompted you to write the piece—usually a situation about which you feel deeply—and ignore other scenarios to which your proposal might apply. And this can

lead you to make proposals that, on closer examination, prove to be unsound.

For instance, say you're outraged by the government's funding childbirths but not abortions. You might therefore propose a new rule that "if the government funds the nonexercise of a constitutional right, then the government must also fund the exercise of the right"; or you might simply propose that "if the government funds childbirth, it must fund abortions," and give the more general claim as a justification. But you might not think about the consequences of this general claim—when the government funds public school education, it would also have to fund private school education (since that's also a constitutional right), and when it funds anti-drug speech, it might also have to fund pro-drug speech.

Your argument, at least at its initial level of generality, is thus probably wrong or at least incomplete. But focusing solely on your one core case keeps you from seeing the error.

One way to fight these errors is a device borrowed from computer programming: the *test suite*. A test suite is a set of cases that programmers enter into their programs to see whether the results look right. A test suite for a calculator program, for instance, might contain the following test cases, among many others:

1. Check that 2+2 yields 4.
2. Check that 3-1 yields 2.
3. Check that 1-3 yields -2 (because the program might work differently with positive numbers than with negative ones).
4. Check that 1/0 yields an error message.

If all the test cases yield the correct result, then the programmer can have some confidence that the program works. If one test yields the wrong result, then the programmer sees the need to fix the program—not throw it out, but improve it. Such test suites are a fundamental part of sound software design. Before going into law, for instance, I wrote a computer program that had 50,000 lines of test suites for its 140,000 lines of code.

You can use a similar approach for testing legal proposals. *Before* you commit yourself to a particular proposal, you should design a test suite containing various cases to which your proposal might apply.*

* See, e.g., Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 336 (2001), for an example of one such test suite that the student used while writing her article, and eventually incorporated into the published version.

Assume, for instance, that you are upset by peyote bans that interfere with some American Indian religions. The government has no business, you want to argue, imposing such paternalistic laws on religious observers. You should design a set of test cases involving requests for religious exemptions from many different kinds of paternalistic laws, for instance:

1. requests for religious exemptions from assisted suicide bans, sought by doctors who want to help dying patients die, or by the patients who want a doctor's help;
2. requests for religious exemptions from assisted suicide bans, sought by physically healthy cult members who want help committing suicide;
3. requests for religious exemptions from bans on the drinking of strychnine (an example of extremely dangerous behavior);
4. requests for religious exemptions from bans on the handling of poisonous snakes (an example of less dangerous behavior);
5. requests for religious exemptions from bans on riding motorcycles without a helmet (an example of less dangerous behavior, but one that—unlike in examples 3 and 4—many nonreligious people want to engage in).[1]*

Then, once you design a proposed rule, you should test it by applying it to all these cases and seeing what results the proposal reaches.

b. What you might find by testing your proposals

What information can this testing provide?

1. *Error:* You might find that the proposal reaches results that even you yourself think are wrong. For instance, suppose that your initial proposal is that religious objectors should always get exemptions from paternalistic laws. Thinking about test case 2 might lead you to doubt that proposal, and conclude that people should not be allowed to help physically healthy people commit suicide. The proposed rule, then, would be unsound.

* The numbered notes in this book are endnotes, which start at p. 293. They generally contain supporting evidence for assertions in the text, or citations to other sources.

What can you do about this?

a. You might think that the proposal yielded the wrong result because it didn't take into account countervailing concerns that may be present in some cases—for instance, the special need to prevent a voluntarily assumed near-certainty of death or extremely grave injury, rather than just a remote risk of harm. If this is so, you could *modify* the proposed test, for instance by *limiting its scope* (for example, by including exception for harms that are likely to be immediate, grave, and irreversible).

b. Another possibility is that the insight that led you to suggest the proposal—in our example, the belief that there should be a religious exemption from peyote laws—is better explained by a *different rule*. For instance, as you think through the test cases, you might conclude that your real objection to the peyote ban is that it's factually unjustified (because peyote isn't that harmful), and not that it's paternalistic. You might then *substitute* a new rule: courts should allow religious exemptions from a law when they find that the religious practice doesn't cause any harm, whether or not the law is paternalistic.

2. *Vagueness:* You might find that the proposal is unacceptably vague. Say that the proposal was that religious objectors should be exempted from paternalistic laws when "the objectors' interest in practicing their religion outweighs the government's interest in protecting people against themselves." In the peyote case, this proposal might have satisfied you, because it was clear to you that the government's interest in protecting people against peyote abuse was weak. But as you apply the proposal to the other cases, you might find that the proposal provides far too little guidance to courts—and might therefore lead to results you think are wrong. This could be a signal for you to *clarify* the proposal.

3. *Surprise:* You might find that the proposal reaches a result that you at first think is wrong, but then realize is right. For instance, before applying the proposal to the test suite, you might have assumed that religious objectors shouldn't get exemptions from assisted suicide bans. But after you think more about this test case in light of your proposal, you might conclude that your intuition about assisted suicide was mistaken.

You should keep this finding in mind, and *discuss it in the article*: It may help you show the value of your claim, because it shows that the proposal yields counterintuitive but sound results.

4. *Confirmation:* You might find that the proposal precisely fits the results that you think are proper. This should make you more confident of the proposal's soundness; and it would also provide some examples that you can *use in the article* to illustrate the proposal's soundness (as Part I.B.3.c, p. 58, discusses).

c. Developing the test suite

How can you identify good items for your test suites? Here are a few suggestions:

1. *Identify what needs to be tested.* The test suite is supposed to test the proposed legal principle on which the claim is based. Sometimes, the claim is itself the principle: For instance, if the proposal is that "the proper rule for evaluating requests for religious exemptions from paternalistic laws is [such-and-such]," you would need a set of several cases to which this rule can be applied.

But sometimes the claim is just an application of the principle: For instance, the claim that "religious objectors should get exemptions from peyote laws" probably rests on a broader implicit principle that describes which exemption requests should be granted. If that's so, then you should come up with a set of cases that test this underlying principle. One case should involve peyote bans but the others shouldn't.

2. Each test case should be *plausible*: It should be the sort of situation that might actually happen. It's good to base it on a real incident, whether one drawn from a reported court decision or a newspaper article. You need not precisely follow the real incident, and you may assume slightly different facts if necessary—the goal is to have the reader acknowledge that the case *could* happen the way it's described, not that it necessarily has happened. But you should make sure that any alterations still leave the test case as realistic as possible.

3. The test suite should *include the famous precedents* in this field. This can help confirm for you and the readers that the proposal is consistent with those cases—or can help explain which famous cases would have to be reversed under the proposal.

4. At least some of the cases should be *challenging for the proposal.* You should identify cases where the proposal might lead to possibly unappealing results, and include them in the test suite. Skeptical readers, including your advisor, will think of these cases eventually. Identifying the hard cases early—and, if necessary, revising the proposal in light of

them—is better than having to confront them later, when changing the paper will require much more work.

5. The test cases should *differ from each other* in relevant ways, since their role is to provide as broad a test for the claim as possible. If you are testing a claim about paternalistic laws, for instance, you shouldn't just focus on drug laws, or just on paternalistic laws aimed at protecting children. You should think of many different sorts of paternalistic laws, and choose one or two of each variety.

6. The cases should yield *different results*. For instance, if your proposed rule judges the constitutionality of a certain type of law, you should find some laws that you think should be found unconstitutional, some that you think should be found constitutional, and some whose constitutionality is a close question.

7. The cases should involve incidents or laws that appeal to as many *different political perspectives* as possible. Say that you are a liberal who wants to argue that the Free Speech Clause prohibits the government from funding viewpoint-based advocacy programs. You might have developed this view because you think the government shouldn't be allowed to fund anti-abortion advocacy, and your proposal will indeed reach the result you think is right in that case.

But what about advocacy programs that liberals might favor, such as pro-recycling advocacy, or advertising campaigns promoting tolerance of homosexuality? It would help if the test suite included such cases, plus generally popular programs such as anti-drug advertising, or programs that even small-government libertarians might like, such as advocacy of respect for property rights (for instance, anti-graffiti advocacy). This wide variety of test cases will help show you whether the proposal is indeed sound across the board, or whether even you yourself would, on reflection, oppose it.

8. In particular, think about *the policy arguments and the private or government interests on both sides,* and find cases in which different arguments or interests are more or less implicated. Say, for instance, you are writing about how state constitutional rights to bear arms should be interpreted. The obvious test cases would focus on situations in which citizens want to defend themselves, and the government wants to prevent criminal misuse of guns.

But what about laws aimed not at preventing crime but at preventing suicide or accidents? What about citizens who are concerned not just about access to guns, but about privacy—for instance, citizens who want

to carry guns concealed rather than openly because they don't want to reveal their actions to everyone, or citizens who don't want their gun ownership or their concealed carry license disclosed in public records? Add test cases that involve laws which implicate these special concerns.

d. Particular problems to watch out for

A proposal can be unsound in many ways, but a few ways are particularly common.

i. Excessive mushiness

Be willing to take a middle path, but beware of proposals that are so middle-of-the-road that they are indeterminate. For instance, if you're arguing that single-sex educational programs should be neither categorically legal nor categorically illegal, it might be a mistake to claim that such programs should be legal if they're "reasonable and fair, and promote the cause of equality." Such a test means only what the judge who applies it wants it to mean.

Few legal tests can produce mathematical certainty, but a test should be rigorous enough to give at least some guidance to decisionmakers. Three tips for making tests clearer:

1. Whenever you use terms such as "reasonable" or "fair," ask yourself what you think defines "reasonableness" or "fairness" in this particular context. Then try to substitute those specific definitions in place of the more general words.
2. When you want to counsel "balancing," or urge courts to consider the "totality of the circumstances," ask yourself exactly what you mean. What should people look for when they're considering all the circumstances? How should they balance the various factors you identify? Making your recommendation more specific will probably make it more credible.
3. If possible, tie your test to an existing body of doctrine by using terms of art that have already been elaborated by prior cases (though this approach has its limits, as the next subsection discusses).

Thus, "single-sex educational programs should be legal if they have been shown in controlled studies to be more effective than co-ed programs" is probably a more defensible claim than "single-sex educational

programs should be legal if they're reasonable." Instead of an abstract appeal to "reasonableness," the revised proposal refers to one specific definition of reasonableness—educational effectiveness—that seems to be particularly apt for decisions about education. It's still not a model of predictability, but it's better than just a "reasonableness" standard.*

Note how test suites can help you find and fix this problem. If you apply a proposal to your test cases, and find that it often doesn't give you any definite answer, you'll know the proposal is too vague. Once you discover this, you can ask yourself "what do I think the results in these cases should be, and why?" Answer this question, incorporate the answer into your original proposal, and you'll have a more concrete claim.

ii. Reliance on legal abstractions

"Reasonableness" at least sounds as vague as it is; other terms, such as "intermediate scrutiny," "strict scrutiny," "narrowly tailored," and "compelling state interest," seem clear but in reality have little meaning by themselves. To the extent that, say, strict scrutiny of content-based speech restrictions provides a relatively predictable test, the predictability comes from the body of caselaw that tells you which interests are compelling and what narrow tailoring means, and not from the phrase "narrowly tailored to a compelling state interest." The terms "strict scrutiny" and "narrowly tailored to a compelling state interest" aren't the test—they are just the names of the test.

Thus, a proposal such as "gun control laws should be examined to see if they are substantially related to an important government interest [i.e., intermediate scrutiny]" doesn't really mean much by itself. To be helpful, the proposal must explain which interests qualify as important and what constitutes a substantial relationship.

Nor is it enough just to say "the courts should borrow the intermediate scrutiny caselaw from other contexts." The intermediate scrutiny tests differ in different contexts, both on their face and as applied. Intermediate scrutiny in sex classification cases, for instance, has a reputation for being a very demanding test, while intermediate scrutiny of

* Some people argue that very flexible tests are actually better than seemingly more rigid ones; if you share this view, you might reject my approach here. Remember, though, that many readers will rightly worry about how your vague test will actually work out in practice. For your article to be convincing, you must either make the test more determinate or persuade these readers to accept its indeterminacy.

restrictions on expressive conduct has generally proven to be deferential; and if you look closely at the elements of the two tests, you'll find that they differ significantly, and for good reasons (since the underlying constitutional concerns animating the tests are different). Similarly, intermediate scrutiny in commercial speech cases was fairly deferential in the mid–1980s, but became much more demanding in the 1990s and early 2000s, all the while being called "intermediate scrutiny."

The solution is, in Justice Holmes's phrase, to "think things not words."[2] Rather than relying on words such as "substantially," "important," or "intermediate," explain which interests may justify the restriction and which may not. Explain when restrictions should be allowed to be overinclusive or underinclusive and when they should not be. Explain when courts should demand empirical evidence that the law serves its goals and when they can rely on intuition. Of course, you may not be able to cover all possible situations, and in some cases where the question is close, your test may properly leave things ambiguous. But the more concrete your proposal, the better.

Note again how test suites can help you identify this problem and refine your claim: Just as in the previous subsection, applying your proposed test to a set of concrete problems can help you see whether it has substance or is just words.

iii. Procedural proposals that don't explain what substantive standards are to be applied

Procedural proposals can be useful: It's often impossible or politically impractical to design the right substantive rule up front, so the best we can do is set up the procedures that will make it more likely that the right rule will eventually emerge. The Constitution itself, for instance, was intended to protect liberty largely through procedural structures, such as bicameralism, separation of powers, and the like. If you genuinely think that the right answer to your problem is better procedures, you should propose that.

But remember that courts and administrative judges, unlike legislatures, are generally required to apply a substantive rule, even if a vague one. It's not enough just to set forth procedures through which these bodies act—if your proposal asks such entities to review something, it has to tell them what rule they should apply.

Thus, say that you want to limit speech restrictions imposed on

students by K–12 school officials; but because you recognize that it's hard to have a clear rule establishing which restrictions are good and which are bad, you propose a statute that requires that any such restrictions be reviewed by administrative law judges. This might be a good solution, but you need to ask: What substantive test should these judges apply?

Your answer might be "the judges must make sure any restriction is constitutional"; but if that's so then (1) you should make that clear, (2) you should explain why you think including administrative law judges as well as traditional judges will make much of a difference, and (3) you should discuss whether such a proposal will indeed materially constrain school officials, given that the Constitution leaves them pretty broad authority over student speech (see *Tinker v. Des Moines Indep. Comm. School Dist.* (1969)). Alternatively, your answer might be "the administrative law judges should independently decide whether the restriction, on balance, is a good idea." Again, if that's your answer, you should make it clear, and discuss whether administrative judges will be good at making such educational policy decisions.

Or you might recognize that there *is* some implicit substantive rule that you want the administrative judges to apply, for instance, "political speech by students must be protected unless there is concrete evidence that the speech has actually disrupted classes at this school." If that's so, you should make clear that your proposal isn't just about procedure but also about substance.

Likewise, it's often tempting to argue that courts should admit a certain class of evidence, for instance evidence about aspects of a person's cultural background that might have led him to act in a certain way. Why not let it in? Don't we trust jurors? Isn't more evidence better than less?

Well, maybe—but much depends on how we expect jurors to consider this evidence. Say that a defendant killed someone because the other person did something that the defendant's culture finds mortally insulting: the victim said something to the defendant, the victim pointed the soles of his feet at the defendant,[3] the victim made a homosexual advance to the defendant, or the victim, who was the defendant's wife, flirted with another man. And say that the defendant wants to introduce evidence of these cultural beliefs in his murder prosecution, seeking to have the jury convict him only of voluntary manslaughter, not murder.

Today, the presence of provocation can generally reduce the offense

from murder to voluntary manslaughter only if the provocation is seen as reasonable by society at large. If this *substantive* rule is retained, then admitting the cultural evidence seems unwise, because jurors generally can't lawfully give effect to the evidence, and the evidence is thus more likely to be prejudicial or distracting rather than relevant.

Of course, if the substantive rule were changed to let murder be reduced to manslaughter whenever the defendant was provoked in a way that's seen as reasonable by the defendant's culture, then courts would have to admit evidence of what the defendant's culture actually believes. But this substantive proposal would be controversial, and should be defended explicitly. You can make your procedural proposal complete only by exposing the substantive assumptions behind it, or the substantive changes that would be required to make it work.

The same goes for proposals that:

1. "courts should take a hard look at X" (a hard look applying what test?),
2. "courts must carefully sift the facts" (what specific item will they be searching for in this sifting, and what role will this item play in what test?),
3. "executive officials must state their reasons for action on the record" (and then their reasons would be reviewed for compliance with what rule?), or
4. "there should be a hearing in which the affected parties may introduce evidence" (what legal rule would this evidence be relevant to?).

Focusing on procedure may often be good—but in such cases there's often an unexpressed substantive proposal lurking. Express it.

6. Soundness: historical and empirical claims

a. Get advice from historians or empiricists on your faculty (and in other departments)

Say you are writing an article about the history of libel law, or an empirical analysis of prostitution laws. You might well choose a torts scholar or a criminal law scholar as your main advisor, either because you want substantive help on that area of that law, or because you

know the professor well.

But you should also get some informal help from a professor who is a historian or an empirical researcher. Such a specialist can give you useful tips about research methods, sources to consult, pitfalls to avoid, and the like—subjects that your main advisor might not be as good at. This person need not take the main role in advising you, but it would be great if he could talk to you near the beginning of your research, and perhaps even read a draft.

If you don't know who the right specialist on your faculty might be, or you're afraid the person might be too busy to make time for you, ask your main advisor to pave the way for you. Your main advisor will probably be eager to help, since he will know his own methodological limitations, and will want you to get advice from someone who doesn't suffer from those limitations. And your main advisor could even get you help from historians or empiricists in other departments.

b. Remember to look for books and non-law articles

Many law students (and even law professors) fall into the habit of doing nearly all their research on Westlaw and Lexis. It's convenient, and for purely legal issues it's usually not bad.

But this won't work for research on history, sociology, economics, and the like. For such research, you'll want to search for articles in the journals that serve the relevant fields. You'll also want to look for books, especially if you're writing about history; books play a much bigger role in historical scholarship than in legal scholarship. Ask your reference librarians for help figuring out how to find all these works (for instance, through resources such as JSTOR).

c. Watch out for the historian's "false friends"—terms whose meaning has changed over time

Language teachers talk about translators' false friends—words in a foreign language that sound familiar, but are quite different. The classic example is the Spanish "embarazada," which means not embarrassed but pregnant. The Russian "magazin" means a shop, not a magazine. If you're not careful, the false friends can fool you into making an error.

Likewise, "The past is a foreign country: they do things differently

there."[4] Among other things, they speak a foreign language that's usually very close to ours (at least if we go back only 200 years or so) but that sometimes includes false friends. To most readers today, "militia" means either the National Guard or some small quasi-private force. In late 1700s America, it generally meant the entire adult white male citizenry (possibly up to age 45 or 60) seen as a potential military force.[5] "Free state" today often means independent state, and in the early 1800s often meant a nonslave state. But in 1700s political works, it generally meant (more or less) a democracy, republic, or constitutional monarchy.[6]

The same is true in many other contexts: Words and phrases subtly change their meanings. Words that were once legal terms of art lose their technical meaning and revert to their lay meaning, and vice versa. Grammatical and punctuation conventions change.

So before relying on your assumption that a term meant the same thing in 1830 or 1730 as it does today, do some investigation. Do some sources that use the term seem odd when the term is assigned its modern meaning? What do contemporaneous legal dictionaries say about the term? What does a faculty member who specializes in the era say about the term?

d. For empirical works, consider whether you're limiting your dataset in ways that undermine your generalizations

Say that you are studying the effect of the Supreme Court's 1963-1990 Free Exercise Clause religious exemption doctrine. You want to figure out how lower courts actually applied the doctrine, which mandated strict scrutiny when religious exemption requirements were denied. Was this strict scrutiny really strict? Or was it, as some argued, "strict in theory but feeble in fact"?[7] So you decide to go through all federal appellate cases applying the Free Exercise Clause to religious exemption requests.

That would be an excellent project (and in fact such a project produced a superb student article)—but you should recognize an important limitation: By looking only at federal cases, you would be missing the possibility that many state courts have applied the federal Free Exercise Clause in a more demanding way than federal appellate courts have. That might seem like a counterintuitive possibility, but it turns out to be largely accurate. Yet your limiting your dataset to federal cases would lead you to miss this observation.

And missing this observation might lead you to make a less sound generalization than you might have if you had looked at a larger dataset. The federal cases, for instance, might lead you to conclude that the Court's Free Exercise Clause strict scrutiny test in practice offered no material help to religious claimants. But this conclusion might be in some measure mistaken or incomplete, if the Free Exercise Clause had helped many litigants in state courts.

Of course time is limited, and you can't cover everything. You must limit your dataset in some ways, if only to decisions that are actually available online. Perhaps you need to limit it in other ways, too. But think at the outset about how you are limiting your dataset, and whether this limitation might lead you to miss data and therefore reach a less sound result than you otherwise would have.

e. Pay especially close attention to the Using Evidence Correctly chapter below (Part V)

The Using Evidence Correctly chapter has material that's helpful even for traditional doctrinal articles; but some of its points—for instance, about reading, citing, and quoting original sources, or about being careful in using survey evidence or correlation evidence—are especially helpful for historical or empirical work. Read the chapter carefully before you start your research.

7. Selling your claim to your readers

Not only must your claim be novel, nonobvious, useful, and sound, but you must show your readers that this is so. More about this shortly (Part I.B.1.b, p. 40).

8. Topics and structures you should generally avoid

Here are some types of articles that you might want to avoid. These recommendations won't always apply: Sometimes, for instance, a journal may insist that you write a case note, or your article may deal with an important and interesting problem that arises only under one state's law. Nonetheless, I think you'll find the suggestions below to be helpful in most situations.

a. Articles that show there's a problem but don't give a solution

Giving a solution makes your article more novel, nonobvious, and useful, and therefore more impressive. You want to show people that you have a creative legal mind that can identify solutions and not just criticize others' proposals. If you think there are several possible solutions, that's fine—just discuss all of them, and explain the strengths and weaknesses of each.

b. Case notes

An article that describes a single case and then critiques it is likely to be fairly obvious, even if it's novel. Also, because it focuses chiefly on only one already decided case, it's less likely to be useful. For instance, *Harvard Law Review* Recent Cases and Leading Cases items are cited more than 10 times less often by courts and nearly 4 times less often by law review articles than are *Harvard Law Review* Notes—even though Harvard publishes twice as many Recent Cases and Leading Cases items as Notes. Recent Cases and Leading Cases items are not quite the same as case notes in other journals (they're shorter than some), but my sense is that case notes in all journals tend to be on average less valuable than articles that focus on the issue rather than on the case.

A case note is also a less impressive calling card to prospective academic employers, and I suspect to law firms as well: It generally doesn't show off your skills at research and at tying together threads from different contexts.

If you got your topic from a particular case, that's fine. But don't focus on the case—focus on the problem, and bring to bear all the cases that deal with the problem.

c. Single-state articles

Articles focusing on a single state's law are generally useful only to people in that state. Such articles may still be valuable, especially if the state is big; but why limit yourself this way?

Other states probably have similar laws, or might at least be considering them. Frame your article as a general discussion of all the laws of this sort, even if it focuses primarily on two or three states as representative cases.

Of course, the various state laws will probably differ subtly from each other, which may require some extra discussion. But while this means some more work, considering these differences may make the article more useful, sophisticated, nuanced, and impressive.

d. Articles that just explain what the law is

These can be useful, and sometimes even novel, but they tend to seem obvious. The reader is likely to say, "true, I didn't know this, but I could have figured it out if I had only done a bit of research." This is just fine if your reader is a busy lawyer looking for a good summary of the law—but not so good if the reader is a professor, a law review editor, or a judge looking for a creative, original-thinking law clerk.

There are exceptions: For instance, showing that the law is actually applied quite differently from the way most people assume might well be nonobvious. But even there, adding a prescriptive component to your description would be helpful. Should the law be applied this way? If not, how can the law be amended to prevent such applications? If yes, should the law be clarified or broadened to make such applications easier?

e. Responses to other people's works

Framing your article as a response to Professor Smith's article will usually limit your readership to people who have already read Smith's article, and will tend to make people see you (fairly or not) as a reactive thinker rather than a creative one.

If your piece was stimulated by your disagreement with Smith, no problem—just assert and prove your own claim, while demolishing Smith's arguments in the process. Cite Smith in the footnotes; Smith's opposition will help show that your claim is important and nonobvious. But don't let Smith be the main figure in your story.

f. Topics that the Supreme Court or Congress is likely to visit shortly

You don't want to write an article that will be quickly preempted by a new federal statute or Supreme Court decision. At best, you'd then have to radically rework your article; at worst, you might have to throw

it out altogether. If you're writing about the law of a particular state, then you likewise need to watch out for new statutes or high court decisions in that state.

Unfortunately, one common way that students find topics—by identifying circuit splits—involves a high risk of the article getting preempted. A circuit split happens when several federal circuit courts of appeals disagree on a particular question. That makes the question more worth writing about, because the split shows that there's an important problem with no obviously right answer. But a circuit split is also a signal to the Justices that it might be time for the Court to resolve the issue.

So if there's a circuit split on your problem, check to see how likely it is that the Court will consider the matter and thus preempt your work. First, make sure that, for each case involved in the split, the Court has denied certiorari or no petition has been filed and the time to file has run out. Second, ask the professors who work in the field whether they think it's likely that the Court will agree to hear a case on this subject soon. Third, ask the same question of the professors who specialize in the Supreme Court; they sometimes have a different perspective from those people who work on the particular subject area.

You might also do the same three things when there is no circuit split on the problem, but the problem seems likely to attract the Supreme Court's or Congress's interest for other reasons. Don't be paralyzed by the risk of preemption—the Court and Congress deal each year with only a small fraction of all the problems out there. But think a bit about how likely preemption seems to be.

Finally, do *not* write on a topic that you think the Court will resolve shortly, in the hope of getting your article published before the Court hears the case. True, it would be great if the litigants or the Justices read your article and relied on it—but that's highly unlikely. And once the Court acts, your article will be largely ignored, since scholars and lawyers will be looking for articles that consider the new decision, rather than articles that predate it.

9. Case notes

As I mentioned on p. 35, I don't recommend case notes. Some journals, though, require you to write case notes, or give you an extra opportunity to publish if you're writing a case note. How can you make your case note as valuable and impressive as possible?

Remember that you still need a claim, and you need it to be novel, nonobvious, useful, and sound. For a case note, though, the claim can be a set of separate claims related to the case, for instance, "The majority opinion misconstrued these precedents in these ways, and the rule the court should have adopted is this-and-such, and the opinion leaves open these questions that should be answered in these ways." For a traditional article, it's often better to have one big claim than several little ones; but in a case note, the rules are different.

Here are several kinds of claims that often work well:

(a) Most obviously, internal criticisms of the majority opinion—that it (i) misinterprets or misapplies precedents, (ii) misinterprets the statutory or constitutional text, (iii) makes an unjustified logical leap, (iv) fails to respond to certain counterarguments, and so on. You need not criticize the majority's result; you might, for instance, argue that the majority reached the right result, but for the wrong reason. But you should probably disagree in some measure with the majority's reasoning, or else it will look like you aren't adding much value beyond what the majority said.

(b) Criticisms that point to the bad results that the majority opinion may lead to. For this, you might want to create a test suite (see p. 21) for the majority's proposed rule, and see which cases expose weaknesses in the majority result.

(c) Criticisms of the vagueness or uncertainty of the majority's rule. Again, the test suite may be helpful here.

(d) Criticisms of the concurring and dissenting opinions. You don't just want to limit yourself to this; but neither do you just want to criticize the majority, because then readers might wonder whether the other opinions might have made all the good points before you did.

(e) Proposals for a better rule than that offered by any of the opinions.

(f) If a case doesn't explicitly announce a rule, or announces a very vague one, syntheses of a clear rule from this case and previous cases, supplemented with your own suggestions.

(g) Explanations of the unresolved questions left by the majority opinion, and proposals for resolving them.

(h) Explanations of the unresolved questions created by the majority opinion, and proposals for resolving them.

B. *Organizing the Article*

1. Write the Introduction

A readable, interesting introduction is crucial to your article's success. Introductions have three important functions:

i. to persuade people to read further;

ii. to summarize your basic claim for those who don't read further, so that they'll remember it and refer back to your piece when they run into a problem to which the claim may be relevant; and

iii. to provide a frame through which those who do read further will interpret what follows.

To accomplish these goals, an introduction must do four things:

(a) show that there's a problem, and do so concretely;

(b) state the claim;

(c) frame the issue; and

(d) do all this quickly and forcefully.

a. Show that there's a problem, and do so concretely

Your introduction should make the reader think, "wow, I need to read the rest of this." The best way to get that reaction is to show that there's an important, interesting problem that needs to be solved. This could be a descriptive problem (does this law work? how did this legal rule come about?) or a prescriptive one (what should be done in these situations?). But whatever it is, you need to persuade readers that they should spend their time reading about this problem.

And the most compelling problems are *concrete* ones. Don't just say that the law is unjust or oppressive, or ignores transaction costs or the plight of the subordinated. Give a specific example—a real scenario is good, but a plausible hypothetical is fine too—that shows how the law can fail. Make the reader say, "interesting, it looks like the law here is unsound" or "I wonder what the right answer is."

This, of course, is related to demonstrating your claim's utility (see below), but it's important in its own right: It makes people want to read what you wrote.

b. State the claim

The Introduction should briefly state the claim, and briefly show its novelty, nonobviousness, and utility. This tells the readers what to expect, and persuades them that your article will make a valuable original contribution by solving the problem as well as identifying it.

Note the "briefly." The Introduction should be short, simple, and clear. It should make the reader want to read further, but it should also simply and memorably communicate your basic point—and the other interesting conclusions that you draw in the process of reaching it—even to those readers who will never read beyond the Introduction.

The best way to show novelty and nonobviousness is implicitly, by briefly explaining your claim and justification in a way that makes the reader say, "I'd never have thought of that." But if you think people might wrongly assume that your topic has already been heavily discussed, and that your claim has already been made by someone else, you might explicitly say something like "surprisingly, it turns out that few scholars have considered [the question]."

Utility is also best shown implicitly: Saying "this is a really useful point" will rarely add much to your argument. Instead, make sure that your introduction clearly summarizes your important findings, and their possible practical and theoretical implications.

c. Frame the issue

Every law has many effects. In an ideal world, readers' judgments about the law would be the same no matter how the question is presented, because readers would consider all the effects. But in practice, the frame—the way you present the issue to the readers, and focus their attention on certain effects—is important.

Consider an article about gun control. Thinking seriously about gun control requires thinking about many things: The thousands of people who die each year from gunshots. The plight of people who need a weapon to defend themselves against criminal attacks when the police aren't there to help. The special concerns of women, who tend to be physically less capable of defending themselves without guns, and who are victimized in particular ways by crime. The Second Amendment and state constitutional provisions that guarantee a right to keep and bear arms. The uncertainty about how useful guns are for self-defense. The

uncertainty about how effective gun controls would be.

Your article will have to confront all these subjects, whatever your bottom line will be; but it matters a lot how you frame the discussion. If you start by stressing that there were almost 11,000 firearms homicides in the U.S. in 1999,[8] and return to this throughout the piece, the reader will be more likely to look at all the evidence through this lens. If you start by stressing that the police are often far away, and that hundreds of thousands or perhaps even millions of people use guns to defend themselves against criminal attacks each year,[9] the reader may approach the evidence from a different perspective.

The Introduction is the place where you construct this basic frame—where you give a simple summary that puts the reader in the right mindset to absorb and agree with your point. Write with this in mind.

d. Do all this quickly and forcefully

The first few sentences of the Introduction can make the reader drop the article, or keep reading it. Don't start with platitudes or generalities that the reader already knows. Start with something that is concrete, and that quickly communicates your perspective.

Consider, for instance, a draft introduction I once ran across (I've numbered the sentences to more easily discuss them):

> [1] Campaign speech has long been a controversial topic among scholars and commentators. [2] Much attention has been devoted to the Supreme Court's treatment of individual expenditures, contributions and spending in *Buckley v. Valeo*. [3] Congress' recent consideration of campaign finance reform provides an ideal opportunity to revisit the 1976 Supreme Court decision that addressed the free speech implications of limits on federal campaign-related activities.
>
> [4] This essay briefly discusses the effects of such limits on individual speech, the disproportionate treatment of speech by the media and justifications presented by several members of the Court in the 2000 decision, *Nixon v. Shrink Missouri Government PAC*.
>
> [5] Let me begin by giving a concrete situation. [6] Imagine you are outraged about a particular candidate's stand on something. [More concrete details follow, aimed at showing that there's a basic First Amendment right to spend money to express your views about candidates.] ...

The first two sentences say something that's obvious to most readers, even those who barely know the field. The third and fourth senten-

ces describe something less obvious—what the article's general topic will be—but they're clunky and boring. The fifth sentence likewise adds little.

It's only the sixth sentence—"Imagine you are outraged"—that has the power to grab the listener. It provides a concrete scenario, which is usually more interesting than generalizations. It also quickly sets the stage for the core argument, which is that you have a right to spend your money to express your views.

Start the Introduction with this sentence, rather than hiding it after five sentences of generalities. If you need to make some general points, make them later, after you've gotten the reader hooked.

e. Some ways to start the Introduction

Finally, a few tips for good ways to start an Introduction. These are not at all the only options, but they often work, and they illustrate some of the guidelines mentioned above.

i. Start with the concrete questions you will try to answer

State with the concrete questions you will try to answer, for instance:

> What may government officials do to prevent speech that they think is evil and dangerous? What may businesses, organizations, or individuals do? ...

This says what the article will be about. It also shows the article will be useful, since most readers will quickly understand that these issues come up often. Later sentences should make this still more concrete, and make it still clearer that the article will be useful.

One possible problem: The reference to "evil and dangerous" speech is a little vague. You should make sure that subsequent sentences give examples, or maybe even work the examples into the opening question itself ("What may government officials do to prevent speech that they think is evil and dangerous, such as bigoted speech, speech that calls for revolution, or speech that advocates violence?").

Here's a worse way to start the same article:

> The freedom of speech is a vital part of the fabric of American democracy. Undoubtedly a wide range of speech cannot be barred by the government. In *Brandenburg v. Ohio*, the Court held that even advocacy of violence may not be restricted unless the advocacy is intended to and likely to provoke imminent violent conduct.
>
> Yet in certain situations some response to evil and dangerous speech may arguably be appropriate. It may be worth considering whether government officials and others may take some steps to prevent such speech....

The opening sentence is a platitude. The second sentence says something general and well-known. The third sentence summarizes a legal rule that most of your readers will know; and even readers who don't know it won't be reading your article to learn it.

The fourth sentence gets to the heart of the question, though indirectly and using a waffle word ("arguably," which I discuss on p. 114). The fifth sentence is when the Introduction first identifies the topic, and even then it doesn't signal that this is *the* topic. And it could be worse: I've seen articles in which the topic isn't identified until the fifth page.

You might hope that the reader will be willing to read on to the fifth sentence. But some readers will start skimming by then. Some won't recognize the fifth sentence as identifying your claim, even if they've read that far. And some will just be put off by early evidence of the article's tendency to meander. So avoid the generalities, and start early with something clear, concrete, and specific to your claim.

ii. Start with concrete examples

Point to concrete scenarios that lead people to wonder, "How should these be resolved?" For instance,

> Some speech provides information that makes it easier for people to commit crimes or torts. Consider:
>
> (a) A textbook describes how people can make bombs. [Each example is followed by a footnote to cases or incidents that deal with the issue.]
>
> (b) A thriller or mystery novel does the same, for the sake of realism.
>
> (c) A Web site or computer science article explains how encrypted copyrighted material can be illegally decrypted.
>
> (d) A newspaper publishes the name of a witness to a crime, thus making it easier for the criminal to intimidate or kill the witness....
>
> These are not incitement cases: The speech isn't persuading or inspiring some readers to commit bad acts. Rather, the speech is giving

people information that helps them commit bad acts—acts that they likely already want to commit. When should such speech be constitutionally unprotected?

This again quickly tells people what the article is about, and gives plausible and concrete examples that (a) help make the subject clearer and less abstract and (b) show that your article will be useful. It also helps that the examples at first seem different, but juxtaposing them under the rubric "information that makes it easier for people to commit crimes or torts" shows the similarity between them. Showing this similarity may itself be a novel, nonobvious, and useful contribution provided by the article.

iii. Start with an engaging story

If you want to start with a story, make sure that it's a vivid story.

> Percy Bysshe Shelley was a poet and a cad. He married his wife, Harriet Westbrooke, when she was 16, but left her for Mary Wollstonecraft Godwin three years later. When Shelley left Harriet, their daughter was a year old, and Harriet was pregnant with their son.
>
> Two years later, in 1816, Harriet drowned herself. When Shelley decided to raise the children himself, Harriet's parents refused to turn them over, and Shelley went to court. Though fathers had nearly absolute rights under then-existing English law, Shelley became one of the first fathers in English history to lose custody of his children.
>
> Percy Shelley was also an avowed atheist—and the Court of Chancery mostly relied on his views, not on his infidelity or unreliability, in denying him custody. Shelley shouldn't be put in charge of the children's education, the Lord Chancellor reasoned: Shelley endorsed atheism and sexual freedom, and would teach his children the same values. Twenty years later, Justice Joseph Story likewise wrote that a father could lose his rights for "atheistical[] or irreligious principles."
>
> Shelley's case may look like something out of another time and place. That time and place, it turns out, is 2005 Michigan, where a modern Shelley might be denied custody based partly on his "not regularly attend[ing] church and present[ing] no evidence demonstrating any willingness or capacity to attend to religion with [his children]," or having a "lack of religious observation." It's 1992 South Dakota, where Shelley might have been given custody but only on condition that he "will agree to present a plan to the Court of how [he] is going to commence providing some sort of spiritual opportunity for the [children] to learn about God while in [his] custody."
>
> It's also 2005 Arkansas, 2002 Georgia, 2005 Louisiana, 2004 Minnesota, 2005 Mississippi, 2006 New York, 2005 North Carolina, 1996 Pennsylvania, 2004 South Carolina, 1997 Tennessee, and 2000 Texas. In 2000, the Mississippi Supreme Court ordered a mother to take her child to church each week, reasoning that "it is certainly to the best interests of [the child] to receive regular and systematic spiritual training"; in 1996, the Arkansas Supreme Court did the same, partly on the grounds that weekly church attendance, rather than just the once-every-two-weeks attendance that the child would have had if he went only with the other parent, provides superior "moral instruction."

This is risky: The first three paragraphs are a story from early 1800s England, introducing an article about modern American law. The item that shocks some readers and shows the relevance of the piece—that some American courts even today prefer more religious parents over less religious ones—begins in the fourth paragraph. A safer way of starting an article on this subject might be:

> Throughout the country, from Michigan to Mississippi to Pennsylvania, child custody decisions often prefer the more religious parent, or the more churchgoing parent. This, I will argue, generally violates the Establishment Clause and the Free Speech Clause. Courts generally ought not be allowed to consider a parent's religiosity even as part of the best interests analysis....

or maybe

> Throughout the country, from Michigan to Mississippi to Pennsylvania, child custody decisions often prefer the more religious parent, or the more churchgoing parent. Some, for instance, count against a parent his "not regularly attend[ing] church and present[ing] no evidence demonstrating any willingness or capacity to attend to religion with [his children]." Some order parents to go to church, for instance by giving a parent custody only on condition that he "will agree to present a plan to the Court of how [he] is going to commence providing some sort of spiritual opportunity for the [children] to learn about God while in [his] custody."
>
> This, I will argue, generally violates the Establishment Clause and the Free Speech Clause. Courts generally ought not be allowed to consider a parent's religiosity even as part of the best interests analysis....

On the other hand, Shelley is a famous poet, and cases involving famous historical figures tend to be interesting. The story is dramatic—abandonment, suicide, an affair with the author of Frankenstein. And introducing the story helps persuade the reader by leading him to think "oh, look at that unfortunate, archaic way of thinking" and then springing on him the continuing presence of this thinking. ("Shelley's case may look like something out of another time and place. That time and

place, it turns out, is 2005 Michigan ....").

So the story is vivid enough that it will likely keep the reader's attention for three paragraphs. And it's relevant enough that it will likely help frame the problem and persuade the reader. If you have a story that is vivid, relevant, fairly short, and not yet cliché, it may be a good way to start the article.

iv. Start with a concrete but vivid hypothetical that illustrates your point

You can also start with a concrete but vivid hypothetical, or a set of hypotheticals that you want to compare with each other.

> Four women are in deadly peril.
>
> Alice is seven months pregnant, and the pregnancy threatens her life; doctors estimate her chance of death at 20%. Her fetus has long been viable, so Alice no longer has the *Roe/Casey* right to abortion on demand. But because her life is in danger, she has a constitutional right to save her life by hiring a doctor to abort the viable fetus. She would have a right to a therapeutic abortion even if the pregnancy were only posing a serious threat to her health, rather than threatening her life.
>
> A man breaks into Katherine's home. She reasonably fears that he may kill her (or perhaps seriously injure, rape, or kidnap her). Just as Alice may protect her life by killing the fetus, Katherine may protect hers by killing the attacker, even if the attacker isn't morally culpable—for instance, if he is insane. And Katherine has a right to self-defense even though recognizing that right may let some people use false claims of self-defense to get away with murder.
>
> Ellen is terminally ill. No proven therapies offer help. An experimental drug therapy seems safe because it has passed Phase I FDA testing, yet federal law bars the therapy outside of clinical trials because it hasn't been demonstrated to be effective (and further checked for safety) through Phase II testing. Nonetheless, the 2006 D.C. Circuit panel decision in *Abigail Alliance for Better Access to Develop mental Drugs v. Von Eschenbach*—since vacated and now being reviewed en banc—would secure Ellen the constitutional right to try to save her life by hiring a doctor to administer the therapy.
>
> Olivia is dying of kidney failure. A kidney transplant would likely save her life, just as an abortion would save Alice's, lethal self-defense might save Katherine's, and an experimental treatment might save Ellen's. But the federal ban on payment for organs sharply limits the availability of kidneys, so Olivia must wait years for a donated kidney;

> she faces a 20% chance of dying before she can get one. Barring compensation for goods or services makes them scarce. Alice and Ellen would be in extra danger if doctors were only allowed to perform abortions or experimental treatments for free. Katherine likely wouldn't be able to defend herself with a gun or knife if weapons could only be donated. Likewise, Olivia's ability to protect her life is undermined by the organ payment ban.
>
> My claim is that all four cases involve the exercise of a person's presumptive right to self-defense—lethal self-defense in Katherine's case, and what I call "medical self-defense" in the others....

Here too there are risks. First, the claim itself is only described in the fifth paragraph (not counting the introductory sentence). Second, the first two paragraphs describe well-known and uncontroversial doctrines. That's their point: They are setting up two uncontroversial examples so the author can argue that the next two examples are analogous to the first two. But an impatient reader might just be annoyed that the first two paragraphs are restating the familiar.

Yet the claim is pretty clearly foreshadowed starting with the third paragraph, where the analogy between protecting life using pharmaceuticals and protecting life using abortion or lethal self-defense is drawn. And if the analogy set forth in the first four paragraphs is powerful, it may be the best way to frame the article's thesis, by getting readers to view things from the outset using the author's analogy.

Note, by the way, what this Introduction doesn't have: It doesn't have any warm-up language describing substantive due process, talking abstractly about courts and tragic choices, saying that courts must sometimes protect important fundamental rights against the democratic process, and the like.

Rather, it starts concretely, with the two hypotheticals that are necessary to understand the analogy at the heart of the article, and moves on quickly to the two specific controversies that the article will offer to resolve. General discussion about how all this fits within the broad debate about unenumerated rights has to be included somewhere in the article. But it shouldn't go at the start of the Introduction, where the goal is to quickly convey to the reader the specific value this particular article will add.

v. Start with an explanation of a controversy

If your article engages an existing controversy, you might want to

start by outlining the controversy, in enough detail that your contribution will be clear. The disadvantage of this approach is that your contribution might not appear for several paragraphs. The potential advantage is that the significance of your contribution may then be especially clear, and your outlining of the controversy might set an evenhanded tone that will lead readers to respond better to your claim when it does come.

Here's an example:

> "A well regulated Militia, being necessary to the security of a free State," the Second Amendment says, "the right of the people to keep and bear arms, shall not be infringed." But what did the Framing generation understand "free State" to mean?
>
> Some say it meant "state of the union, free from federal oppression." As one D.C. Circuit judge put it, "The Amendment was drafted in response to the perceived threat to the 'free[dom]' of the 'State[s]' posed by a national standing army controlled by the federal government."
>
> This reading would tend to support the states' rights view of the Second Amendment, and is probably among the strongest intuitive foundations for the view—after all, "State" appears right there in the text, seemingly referring to each State's needs and interests. The reading would suggest the right might cover only those whom each state explicitly chose as its defensive force, perhaps a state-selected National Guard. And it would suggest the Amendment doesn't apply outside states, for instance in the District of Columbia: "the District of Columbia is not a state within the meaning of the Second Amendment and therefore the Second Amendment's reach does not extend to it."
>
> But if "free State" was understood to mean "free country, free of despotism," that would tend to support the individual rights view of the Amendment. "[T]he right of the people" would then more easily be read as referring to a right of the people as free individuals, even if a right justified by public interests, much as "the right of the people" is understood in the First and Fourth Amendments. The right would cover people regardless of whether they were selected for a state-chosen defensive force, since the right would not be focused on preserving the states' independence from the federal government. And it would apply to all Americans, in states or in D.C.
>
> We see a similar controversy about the change from James Madison's original proposal, which spoke of "security of a free country," to the final "security of a free state." Some assume the change was a deliberate substantive shift towards a states' rights provision, and point in support to the Constitution's general use of "state" to mean state of the union (except where "foreign State" is used to mean "foreign country"). Others disagree, arguing that the change was purely stylistic,

> and sometimes pointing to the absence of recorded controversy about the change.
>
> This Article makes a simple claim: There's no need to assume. There is ample evidence about the original meaning of the term "free state." "Free state" was used often in Framing-era and pre-Framing writings, especially those writings that are known to have powerfully influenced the Framers: Blackstone's *Commentaries* (which I'll discuss in Parts II and III), Montesquieu's *Spirit of the Laws* (Part IV), Hume's essays (Part V), Trenchard and Gordon's *Cato's Letters* (Part VI), and works by many of the other European authors who are known to have been cited by Framing-era American writers (Part VII). It was also used by many leading American writers as well (Part VIII), including John Adams in 1787, James Madison in 1785, and the Continental Congress in 1774.
>
> Those sources, which surprisingly have not been canvassed by the Second Amendment literature, give us a clear sense of what the phrase "free state" meant at the time. In 18th century political discourse, "free state" was a well-understood political term of art, meaning "free country," which is to say the opposite of a despotism. [More details follow.]

The Introduction starts by crisply articulating the issue (as in the example in subsection i above, p. 42). It then outlines the role the term "free State" has played in the Second Amendment debate (rather than just setting forth the Second Amendment debate more broadly). The hope is that by the time the sixth and seventh paragraphs arrive, and the reader sees the article's claim, the reader will want to hear how this dispute should be resolved. The fear is that the reader won't get to the sixth and seventh paragraphs, or will be skimming or bored by then.

Compare this to how the Introduction would look if the claim were brought to the first paragraph, and decide for yourself which would be more effective:

> "A well regulated Militia, being necessary to the security of a free State," the Second Amendment says, "the right of the people to keep and bear arms, shall not be infringed." But what did the Framing generation understand "free State" to mean? This Article will argue that this phrase was consistently understood to mean "free country," which is to say the opposite of a despotism—not "state of the union, free from federal oppression."
>
> Many have assumed that "state of the union, free from federal oppression" was the contemporaneously understood meaning. As one D.C. Circuit judge put it, "The Amendment was drafted in response to the perceived threat to the 'free[dom]' of the 'State[s]' posed by a national standing army controlled by the federal government."

This reading would tend to support the states' rights view of the Second Amendment, and is probably among the strongest intuitive foundations for the view—after all, "State" appears right there in the text, seemingly referring to each State's needs and interests. The reading would suggest the right might cover only those whom each state explicitly chose as its defensive force, perhaps a state-selected National Guard. And it would suggest the Amendment doesn't apply outside states, for instance in the District of Columbia: "the District of Columbia is not a state within the meaning of the Second Amendment and therefore the Second Amendment's reach does not extend to it."

But, this Article concludes, such a meaning is inconsistent with how the phrase was used in writings that are known to have powerfully influenced the Framers: Blackstone's *Commentaries* (which I'll discuss in Parts II and III), Montesquieu's *Spirit of the Laws* (Part IV), Hume's essays (Part V), Trenchard and Gordon's *Cato's Letters* (Part VI), and works by many of the other European authors who are known to have been cited by Framing-era American writers (Part VII). It was also used by many leading American writers as well (Part VIII), including John Adams in 1787, James Madison in 1785, and the Continental Congress in 1774.

Those writings used the phrase to mean "free country, free of despotism," which tends to support the individual rights view of the Amendment. Such a reading makes it easier to read "the right of the people" as referring to a right of the people as free individuals, even if a right justified by public interests, much as "the right of the people" is understood in the First and Fourth Amendments. Such a right covers people regardless of whether they were selected for a state-chosen defensive force, since the right is not focused on preserving the states' independence from the federal government. And it applies to all Americans, in states or in D.C.

Likewise, the evidence that the article canvasses helps resolve the controversy about the change from James Madison's original proposal, which spoke of "security of a free country," to the final "security of a free state." Some assume the change was a deliberate substantive shift towards a states' rights provision, and point in support to the Constitution's general use of "state" to mean state of the union (except where "foreign State" is used to mean "foreign country"). Others assume the change was purely stylistic, sometimes pointing to the absence of recorded controversy about the change. This latter view, which cuts in favor of the individual rights view, seems to be correct. [More details follow.]

vi. Start with an argument or conventional wisdom you want to rebut

If your article is an attempt to rebut some argument, or some conventional wisdom, you may want to start by quickly identifying what you're arguing against. But do it quickly; don't spend pages talking about others' arguments—quickly reveal to the reader what you are going to say. A short sample:

> Which Justices generally take a broader view of the freedom of speech and which take a narrower view? Conventional wisdom still tells us that this should break down mostly along "liberal"/"conservative" lines, as it seemingly did during the 1970s and much of the 1980s. But it turns out that this is no longer true. [The article goes on to provide the evidence.]

Or another one—a very short articulation of the other side's argument in a short Introduction:

> The Supreme Court has often held that content-based restrictions on fully protected speech are valid if they are "narrowly tailored to serve a compelling state interest." I believe this is wrong.
>
> It is wrong descriptively: There are restrictions the Court would strike down—of which I'll give examples—even though they are narrowly tailored to serve a compelling state interest. It is wrong normatively: In striking these restrictions down, the Court would, in my view, be correct. And the official test is not just wrong but pernicious. It risks leading courts and legislators to the wrong conclusions, it causes courts to apply the test disingenuously, and it distracts us from looking for a better approach.
>
> After briefly restating strict scrutiny doctrine (Part I), I'll give three examples of speech restrictions that in my view would pass muster if the strict scrutiny framework were taken seriously, but that nonetheless would and should be struck down (Part II). I'll then point to some of the costs of the Court's reliance on an unsound doctrinal structure (Part III), and finally (Parts IV and V) suggest the rough foundations—and, I concede, only the rough foundations—of two alternative approaches.
>
> The first alternative is for the Court to acknowledge that there is a third prong to strict scrutiny, which I call "permissible tailoring." Rather than just asking about the strength of the government's interest, or about whether the means are narrowly drawn to accomplish the interest, it asks whether the means are nonetheless impermissible: Whether, no matter how narrow they are, and no matter how compelling an interest they serve, the means are still contrary to some basic

prohibitions that the Free Speech Clause imposes. This, I'll argue, is an inquiry quite distinct from what the Court requires under the "narrow tailoring" prong.

The second alternative, which I prefer, is for the Court to shift away from means-ends scrutiny, and toward an approach that operates through categorical rules—such as a per se ban on content-based speech restrictions imposed by the government as sovereign—coupled with categorical exceptions, such as the exceptions for fighting words, obscenity and copyright. I think this framework would better direct the Court's analysis, and would avoid the erroneous results that strict scrutiny seems to command.

This Introduction has its flaws. First, the second alternative proposal isn't defined precisely and concretely enough. (This reflects a flaw in the article more generally.) Second, it might have been better to mention a few concrete examples in the second paragraph, rather than just promising to get to them in Part I.

Still, the Introduction has the merit of being short and focused on exposing the article's value added. And while it begins with articulating the argument that the article is trying to rebut, it articulates that opposing argument as concisely as possible, and doesn't let the argument dominate the discussion.

f. Organize the introduction as a roadmap, instead of having a separate roadmap paragraph

Law reviews often ask for so-called "roadmap paragraphs" at the end of the Introduction. Here's an example:

This Comment, in Part I, explains what speech harassment law restricts, and how it restricts it. Part II confronts the arguments, made by some courts and some commentators, that harassment law can already be justified under some of the existing First Amendment doctrines—for example, as a time, place, or manner restriction, or a legitimate attempt to protect a captive audience—but finds that none of the arguments has merit. Finally, Part III introduces the directed speech/undirected speech distinction, and argues that it is the most practical place to draw the line between harassing workplace speech that must be protected and harassing workplace speech that may be restricted.

Some sort of roadmap is good: Readers do find it useful to get a sense of how the article will flow, and of where to look for particular sections of the analysis. You as the writer may also find it helpful to lay

out the roadmap at the outset, just to give yourself a better idea of how you want to write the article.

But roadmaps written as separate paragraphs tend to seem forced, boring, and hard to read. Instead, try organizing the Introduction itself as a roadmap. The Introduction is supposed to be a summary of the rest of the article; so summarize the article in a persuasive, well-flowing way, and note where your summary goes from Part to Part. That way the roadmap may take up many paragraphs, but it won't require any extra paragraphs, and it will seem more organically connected to the rest of the Introduction. Here's an entire introduction that illustrates this (the Introduction is to a cowritten article, which explains the "we"):

Say we think a new book is going to libel us, and we ask a court for a preliminary injunction against the book's publication. We argue that we're likely to succeed on the merits of our libel claim, and that failure to enjoin the speech would cause us irreparable harm.

Too bad, the court will certainly say; a content-based preliminary injunction of speech would be a blatantly unconstitutional prior restraint. Maybe after a trial on the merits and a judicial finding that the speech is in fact constitutionally unprotected libel, we could get a permanent injunction, though even that's not clear. But we definitely could not get a preliminary injunction, based on mere likelihood of success. Likewise for preliminary injunctions against obscenity and other kinds of speech, despite the fact that such speech, if ultimately found to be unprotected at trial, could be criminally or civilly punished.

In copyright cases, though, preliminary injunctions are granted pretty much as a matter of course, even when the defendant has engaged in creative adaptation, not just literal copying. How can this be?

True, the Supreme Court has held that copyright law is a constitutionally permissible speech restriction; though copyright law restricts what we can write or record or perform, the First Amendment doesn't protect copyright-infringing speech against such a restraint. But libel law and obscenity law are likewise constitutionally valid restrictions on speech, and yet courts refuse to allow preliminary injunctions there. The "First Amendment due process" rule against prior restraints applies even to speech that's alleged to be constitutionally unprotected. Why, then, not to allegedly infringing speech?

We explore this question below. In Part I, we discuss the history of preliminary injunctions in copyright cases and the current law relating to such injunctions. In Part II, we develop our central thesis by explaining why copyright law is a speech restriction; why preliminary injunctions of speech are generally unconstitutional; and why, at least as a doctrinal and conceptual matter, it's hard to see how copyright law

could be treated differently for First Amendment purposes. What's more, we argue, giving copyright law a free ride from the normal First Amendment due process rules risks discrediting those rules in other contexts.

In Part III, we step back and ask whether this inquiry has cast some doubt on the prior restraint doctrine itself—whether copyright law's tolerance of preliminary injunctions might be right, and the free speech doctrine's condemnation of such injunctions might be wrong. In Part IV, we discuss the implications of the collision between copyright law principles and free speech principles, and propose some changes that are needed to bring copyright law into line with constitutional commands. We conclude that permanent injunctions in copyright cases should generally be constitutional, and the same should go for preliminary injunctions in cases that clearly involve literal copying, with no plausible claim of fair use or of copying mere idea rather than expression. Other preliminary injunctions, though, should generally be unconstitutional.

In Part V, we briefly explore these questions with regard to other kinds of intellectual property—trademarks, rights of publicity, trade secrets, and patents. We conclude that the problem is not limited to copyright, and that at least in trademark and right of publicity cases, preliminary injunctions may sometimes run afoul of the First Amendment. Finally, in Part VI we say a bit about the practical prospects for revising the law along the lines we suggest.

2. Explain the facts and legal doctrines necessary to understanding the problem

a. Focus on what's really necessary

This section is sometimes called the "background" section. Unfortunately, this tends to lead some authors into throwing in as much background as possible, and it obscures what aspects of the background are most important.

As a result, too many student articles spend eighty percent of their time setting forth the "background" and twenty percent explaining and proving their claims. And doing this is tempting: Describing the existing law, facts, or history is easier than articulating and defending an original claim. Plus, when you've spent many weeks doing research, it's hard to cut down the result to just a few pages.

Yet the purpose of your article is to state and prove your claim.

That's where the action is, and you should be excited and impatient about getting there. Your claim and your proof are what you're adding to the field of knowledge; your achievement will be measured largely by this value added. You can't prove your claim without explaining certain facts and legal doctrines, but do this as tersely as possible.

So instead, think of this section as the section that explains those items that are *necessary* to understanding the problem. For instance, if you're writing about how the law should treat nonlethal weapons (such as stun guns and pepper sprays), you need to explain those facts about nonlethal weapons that are necessary to understanding such regulations. For instance, you should note what kinds of injuries these devices can inflict, how many times they can be used before reloading, in what circumstances they don't work well, and the like.

Do not explain the history of stun guns, except to the extent that it's necessary to understanding the regulatory regime. Do not explain the chemistry of pepper sprays. These are detours that will take the reader away from the heart of your article: how the law should treat nonlethal weapons.

Likewise, if you're writing about the First Amendment and restrictions on parent-child speech in child custody cases, you'll need to briefly explain the basic definitions, such as the differences between legal custody and physical custody, and between custody and visitation. You'll also need to briefly explain the family law rules that you're analyzing. You might also briefly summarize the First Amendment rules, though you might want to save that for the substantive analysis section, where you can introduce the rules as you apply them.

But don't write a minitreatise on the law. Don't even describe all the law and all the facts that you'll later use. All you must do in this section is give the reader the legal and factual framework necessary to generally understanding what follows. You'll have plenty of time to go into more detail later, as you set out your proof.

Also, don't talk in detail about how the rules have evolved over the centuries, again except to the extent that it's necessary to understanding the rules today. Don't discuss the leading cases related to the rules in detail, unless they are necessary to grasping the issue. Where possible, synthesize the precedents into a crisply stated rule (with the precedents cited in the footnotes, as needed) rather than discussing each case.

b. Synthesize the precedents, don't summarize them

A bit more on the synthesizing I just mentioned: You should generally synthesize the precedents, not describe each one or explain how the law came to be the way it is. If the history is necessary to give a full picture of what the law means, you should of course mention it. But to the extent that the history doesn't really matter, cut it out. Your main mission is to prove your claim. Unnecessary tangents might seem interesting and colorful, but in practice they usually end up being distractions and excuses for the reader to stop reading.

Likewise, if there's a leading case that you need to compare and contrast in detail with the scenario about which you're writing, you'll need to discuss the case in detail in the proof section. Don't repeat all this detail in the background explanation section. And certainly don't go into the facts of the case if the facts are not really needed to understand the law.

Instead, briefly state the relevant rule, in whatever detail is needed, and cite your authorities in the footnotes. Imagine, for instance, that you're writing an article about how libel law should apply to false accusations of homosexuality (a surprisingly complex question), and that you want to set forth the basic First Amendment rules about what mental states must be proven for liability. You probably shouldn't write something like:

> In 1964, the Supreme Court handed down a landmark libel decision in *New York Times Co. v. Sullivan*. Police commissioner Sullivan sued the *New York Times* for publishing allegedly false statements about him. Six Justices held that in a libel case brought by a public official, where the speech was on a matter of public concern, the plaintiff could not recover unless he showed that the defendant knew the statement was false, or was reckless about the statement's potential falsehood. The other three Justices would have categorically forbidden public officials from recovering libel damages when the statement was on a matter of public concern.
>
> Three years later, in *Curtis Publishing Co. v. Butts*, the Supreme Court extended this rule to public figures who were not public officials. Butts was a state university football coach who was accused of leaking the team's playbook to an opposing team, but he was technically employed by a private organization, not by the state, and was thus not a public official. The Court concluded that his not being employed by the state should not change the constitutional analysis.
>
> But in 1974, the Supreme court substantially cut back on protection for defendants. In *Gertz v. Robert Welch Co.*, lawyer Elmer Gertz sued the publisher of the anti-Communist John Birch Society's magazine for libel, based on an article that accused him of having a criminal record and of being a Communist. The Supreme Court held that when the statement was about a private figure, the plaintiff could recover compensatory damages if he showed that the defendant was negligent about whether the statement was false. Presumed and punitive damages could still be recovered only on a showing of knowing or reckless falsehood.
>
> Finally, in the 1985 *Dun & Bradstreet v. Greenmoss Builders* case, the Court cut back protection still further. Greenmoss Builders sued credit rating company Dun & Bradstreet for falsely stating that Greenmoss had filed for bankruptcy. The Court held that where the statements were on matters of purely private concern, plaintiffs could recover compensatory, punitive, and presumed damages based merely on a showing of the defendant's negligence. The Court's opinion even left open the door for strict liability in such cases, though it didn't specifically confront this question.

In an article that's about modern libel law, the details of the past Supreme Court cases probably don't much matter; neither does the history of the law's evolution. Even if you do make arguments based on this history, or analogize to the facts of the past cases, you'll need to cite that history or those facts later in the article, where you make your arguments. You won't be able to rely on readers' remembering these points from the Background section.

Instead, synthesize the cases into a rule:

> The First Amendment rule in libel cases turns on two main factors: (1) whether the plaintiff is a public figure (a category that includes public officials but is not limited to them), and (2) whether the statement is on a matter of public concern.
>
> Plaintiffs may recover in public figure / public concern cases only if the defendant knew the statement was false, or was reckless about the possibility of falsehood. In private figure / public concern cases, this same knowledge-or-recklessness standard applies for punitive and presumed damages, but the plaintiff may recover compensatory damages even if the defendant was merely negligent about the statement's falsehood. And in private concern cases, the plaintiff may recover all sorts of damages even when the defendant was merely negligent; and the Court has left open the possibility that defendants in such cases may even be held strictly liable.

Then just cite the relevant cases, with the proper parentheticals, in a footnote.

There are other ways to summarize the rule; you might, for instance, use a table or a numbered or bulleted list, devices that are often clearer than simple prose. But in any event, give the reader the background that he needs for understanding your article—don't waste his time with facts that are irrelevant to your claim.

3. Prove your claim

This is where you can shine, by showing that your claim is correct, and that it's the best way of solving the problem you've identified. Some tips:

a. Show that your prescription is both doctrinally sound and good policy

Don't just show that your prescriptive proposal (if you have one) fits the case law; also persuade your reader that it's practically and morally sound. Authors often come up with a neat logical argument that supposedly proves a law's unconstitutionality or explains how a law must be interpreted, but that leaves many readers unpersuaded. To the extent possible, show that your proposal makes practical sense as well as logical sense—that it is good policy as well as consistent with the doctrine.

b. Be concrete

Illustrate your theoretical arguments with concrete examples, drawn from real cases or realistic hypotheticals. This will make your point clearer to your reader; it will show that you have a point and aren't just playing a theoretical shell game; and it will often make your point clearer to you, or lead you to rethink it.

c. Use the test suite

The test suite you used to show yourself that the prescriptive part of your claim is sound (see Part I.A.5.a, p. 21) can prove the same to your readers. The test suite involves concrete test cases. It illustrates different aspects of your proposal. And if done right, it involves cases that come from a variety of political perspectives, and thus shows that you've thought through a broad range of implications that your proposal

may have, not just those that seem to fit your politics.

At least in the first draft, try to mention every test case from your test suite.* Then, if necessary, you can remove the ones that prove redundant.

d. Confront the other side's arguments, but focus on your own

Deal with all the counter-arguments, but take the offensive. Don't write "Some people say that this law fits within the captive audience doctrine, and this might at first seem plausible. Let me quote what they say: .... But on further reading it turns out that this isn't so, because ...."

Instead, write "the law can't be justified under the captive audience doctrine, because...." Cite your adversaries and rebut their assertions, but don't let them be the main characters in your discussion.

e. Turn the problems in your argument to your advantage

i. Improve your argument

Squarely confront the logical and practical difficulties with your argument; don't try to sweep them under the rug. Be honest with your reader—it's the right thing to do, it's more effective, and it'll make you feel better about your work.

To begin with, confronting the difficulties can turn a banal, straightforward argument into one that's more nuanced and interesting. Say that the leading precedent in the field doesn't support your claim as squarely as you'd like. Don't just ignore this; explain how some other precedents or policy arguments fill the gap.

For instance, suppose your argument rests partly on the claim that public single-sex junior high schools are unconstitutional. You could just cite *Mississippi University for Women v. Hogan* and *United States v. Virginia* for your proposition, as some people do.

But these cases don't actually stand for quite so broad a principle—they involve college education, and they stress the particular character-

* For examples of using test cases in a published article, see Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 Sup. Ct. Rev. 141, 183–87, and Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 336–66 (2001).

istics of the programs involved in each case. If you rely only on these cases, many readers will be unpersuaded, and you'll also have lost your chance to show off your reasoning skills. Rather, explain why the broader policies embodied in the Court's equal protection jurisprudence fill the gap between the precedents and your proposed rule; or explain why, even if a gap remains, your case is factually close to the situations in the precedents.

Do the same when you see ambiguity in the facts, history, statutory or constitutional text, or policy arguments: Acknowledge the ambiguity and explain why your choice is better than the alternatives. You shine by showing how you deal with the tough questions, not by pretending that the tough questions are easy.

ii. Refine your claim

The difficulties can also lead you to make your claim more moderate and nuanced. Say your argument proves your claim in most cases, but not in all: For instance, say that it persuasively shows that single-sex K–12 schools are usually unconstitutional, but that it doesn't really work for programs specially aimed at students who have been sexually abused or who are mentally disturbed.

Maybe you should change your claim from "single-sex public education is unconstitutional" to "single-sex public education is generally unconstitutional, but single-sex public education of certain kinds of hard-to-teach children is constitutional." This may be a sounder claim, and it's also more likely to be novel and nonobvious.

iii. Acknowledge uncertainty

The difficulties with your argument can also require you to acknowledge some uncertainty, and to prove your argument as best you can in the face of that uncertainty.

This can help make your work look more sensible and thoughtful. After all, little in our lives or in the law can be logically proven. We must often make the best guess we can, given gaps in the evidence. It's no great loss to admit this, assuming you have enough evidence to make your point plausible, even if not formally proven.

Say the cases are best read as holding only that public single-sex K–12 education is unconstitutional unless there's strong evidence that

such programs are educationally valuable; and say people disagree about the evidence. Use the evidence on your side as best you can, acknowledge that there's disagreement, and make the best pragmatic, logical, and doctrinal argument you can for your point—for instance, you might argue that, in the face of disagreements about the facts, courts should err on the side of nondiscrimination and thus coeducation.

This is especially true for historical or empirical claims. It's hard to be sure about what people really believed or did many decades or centuries ago, or about what's happening in thousands of courtrooms or workplaces today; and readers who think deeply about such matters realize this. Make your descriptive claims clearly and forcefully, and explain why your interpretation of the history or of the data is the best one. But also acknowledge what other interpretations there might be.

iv. Acknowledge costs

Finally, the difficulties can make you acknowledge that your proposal is not cost-free—that it to some extent sacrifices important government interests, or causes some possibly harmful side effects, or may at times be hard to administer. Skeptical readers will see these problems on their own, even if you don't admit that they exist. If you ignore the problems, the readers may assume the worst about the problems' magnitude.

If, however, you acknowledge the costs of your proposal but explain why the benefits exceed the costs, you can persuade many readers. No one expects any new proposal to be perfect. Explaining the proposal's downside can actually make it more credible—and can make you look more forthright and realistic.

4. Make your article richer: Connect to broader issues, parallel issues, and subsidiary issues

a. Go beyond the basic claim

So far, we've focused on the core claim: The nugget of novelty, nonobviousness, and utility that will be your contribution to the state of legal knowledge. This is the heart of your article, and you should focus primarily on explaining and proving it.

Most claims, though, can provide insights that go beyond their nar-

rowest boundaries; the claims have unexpected implications that flow naturally from them, even though these implications don't strictly need to be discussed. Exploring these matters can add nuance to your core claim that will make it more novel and nonobvious.

More broadly, it can make your article richer and more sophisticated—a thorough exploration of many facets of the problem, rather than just one narrow claim. Such an article will be more useful to people interested in the problem; and, if done right, these connections will make people think better of your article and therefore of you.

b. Connections: Importing from broader debates

Begin by asking yourself whether some of the issues you raise are special cases of broader matters on which there are already academic debates. For instance, if you are writing about a particular individual right, are there any theories of individual rights that you can draw on for your analysis? If you're interpreting one provision of a statute, is there a broader discussion going on in the law reviews about the statute's purpose or overall impact?

Say your work discusses whether a particular kind of statement should be admitted as evidence under some exception to the hearsay rule. There are many debates in the literature about hearsay generally—about whether hearsay should even be presumptively excluded in the first place, about whether there should be a single discretionary standard ("allow hearsay evidence if there are sufficient indicia of trustworthiness") or a rule that generally excludes hearsay but has many detailed exceptions, and so on. Do some points raised in these debates help you support your arguments? Do they provide counterarguments to which you ought to respond?

These connections to broader matters aren't always helpful. Sometimes, the broader, more theoretical arguments are notorious for not giving much of a concrete answer in any particular case. In other situations, the broader discussion may be too many levels of abstraction above your particular question: If you're talking about whether certain restrictions imposed on felons violate the Ex Post Facto Clause, and if you already have lots of doctrine and policy argument to draw on for your analysis, a discussion of the debates about whether courts should rely on natural law or original meaning may not be terribly useful.

But sometimes the theories might indeed provide valuable insights.

Even if their application won't form the core of your argument, they may shed light on a particular aspect of the argument, or supply important counterarguments that you should rebut. Also, discussing the theories can help assure the reader (a) that you aren't missing some theoretical objections, and (b) that you are a sophisticated thinker who knows the important theoretical literature. You shouldn't overdo this—a weak, unnecessary, or unoriginal application of the theory can sometimes alienate readers more than impress them. Still, if you can do a good job with the theory, your article will be more impressive.

c. Connections: Exporting to broader debates

Just as broad debates can have applications to narrower problems, good solutions to the narrower problems can illuminate a broader issue. If you have persuasively shown that the right answer here is X, and some broader theory says that the answer should be Y, then your concrete point is evidence that the broader theory is mistaken (or at least is not applicable here), and that the theory's rivals may be more sound. For instance, if you show that certain speech should be protected under the First Amendment even though it would be unprotected under some free speech theory (the "marketplace of ideas," the "constitutional tension method," or what have you), then you might use your conclusion to cast doubt on the value of that theory more generally.

If done right, this sort of connection will make your piece deeper and more useful, and thus more impressive. People often accept or reject broad legal theories based not just on abstract legal arguments, but also on how well the theories fit with the results that seem proper in specific cases. Your article may provide powerful practical support or a powerful practical counterexample to some broad theoretical argument.

d. Connections: Importing from parallel areas

Sometimes, the best connections for your article come not from broader theories but from analogous issues in parallel areas. For instance, say that you are writing about whether waiting periods for buying a gun violate state constitutional right to keep and bear arms provisions.* Can you draw some analogies from the cases dealing with wait-

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* *See, e.g.*, Wis. Const. art. I, § 25 (enacted 1998) ("The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.").

ing periods for abortions, parade permits, or voting?

The analogies need not be perfect; you can often enrich your argument by pointing out the differences between your area and the other areas that at first might seem similar. Your reader might already have thought of these apparent similarities, and your discussion can dispel the reader's misconceptions. Likewise, the very process of pointing out the differences between, say, self-defense rights, abortion rights, speech rights, and voting rights might make the proof of your claim more persuasive. And sometimes, as with the importation from broader debates, the analogies may help you refine the claim itself.

e. Connections: Exporting to parallel areas

Again, once you're done seeing what light the analogies from parallel areas can shed on your problem, you should ask whether your solution sheds light on the parallel questions. If you conclude that waiting periods for buying guns don't unduly burden self-defense rights, can you generalize to a broader claim about waiting periods for the exercise of other constitutional rights? If you think that the answer should be different in different situations, can you come up with a general principle that distinguishes contexts where waiting periods are undue burdens from contexts where they aren't? Or can you at least draw a distinction that can help differentiate the two kinds of contexts, even if it can't do the entire job itself?

Even if there isn't yet any broader academic debate on your general subject, your claim might have possible consequences that would be worth noting. For instance, your argument about one provision of a statute might illuminate the interpretation of other provisions; you don't need to analyze those provisions fully, but it helps if you at least highlight your argument's implications. Perhaps you can start a broader academic discussion yourself.

f. Connections to subsidiary questions

Finally, consider what will happen if your claim is accepted. To begin with, ask what the people who would implement your proposed rule would have to do to make it work properly.

Would prosecutors enforcing your proposed law have to exercise their discretion in unexpected ways? Would your substantive proposal

have nonobvious procedural applications? Would there be problems of proof that might require changes to certain evidentiary rules, or at least to trial tactics? Discussing such questions can make your article more useful and complete, and might generate new and interesting insights.

For instance, say you're arguing that speech revealing certain facts about someone's sex life should be seen as tortious, and that liability for such speech wouldn't violate the First Amendment. Your substantive constitutional point could have procedural implications for how such trials should be conducted. For instance, you might argue that though compensatory damages should be allowed in such cases, punitive damages should be restricted, by analogy to the rule in certain libel cases. Or you might explore whether such speech should lead only to damage awards, or whether courts should also be allowed to enjoin the speech, despite the ostensible rule against prior restraints.

You might also find that in some contexts your claim has unexpected substantive implications. For instance, does your broad point about revealing facts have particular consequences for publication of photographs, or of tape recordings? Even if the legal rule is the same, might it affect people's behavior differently in different situations?

Ask also what effect this rule will have on other tort rules. Will it make some of them unnecessary? Will it make others more important? For instance, in some recent cases the right of publicity has been used to bar the unauthorized distribution of nude photographs of celebrities. Would your proposed privacy right make such an extension of the right of publicity unnecessary or even undesirable?

g. A cautionary note

There are risks to exploring all of an article's implications:

1. If you explore them thoroughly, your article may become too long.
2. If you only sketch them lightly, the reader might find the discussion too cursory, too vague, or insufficiently supported; and this bad impression might undo some of the good impression that your core argument initially made.
3. If you don't structure the discussion well, some of the connections might become confusing tangents that distract your reader from the main point.

4. If you are too ambitious in looking for connections, you might find yourself drawing analogies that don't ring true.

The trick is to:

- create a solid core argument;
- incorporate into it those connections and implications that are necessary to a full understanding of your point;
- discuss the other connections and implications in some detail—perhaps in a separate section—while making clear that your main point doesn't stand or fall with them; and
- be cautious about the analogies you draw and the connections you make, and ruthlessly edit out those that on reflection don't seem persuasive enough.

Thus, first make sure that the readers understand your main point, and are impressed by it. Then, once they are already thinking well of you, they'll be more charitable towards any broader but tangential points that you might make.

But *be willing to cut those tangents.* Show readers—your faculty advisor, your trusted and thoughtful friends, your law review editor—a basically finished draft of your article. And if some of the readers tell you that some of the connections don't really work, be ready to edit them out.

Yes, it will be painful to jettison sections that you've worked hard to write, but you'll probably find that for every connection you cut, you'll be keeping two. And the connections that you keep will help make your article richer and more impressive than if you'd stuck only to the bare necessities.

5. Rewrite the Introduction

a. Rewrite the introduction in light of how your thinking has changed

When you're done with your draft, rewrite the introduction. Since you wrote it, you might have:

(a) changed your claim,

(b) found better arguments for your claim,

(c) found better examples to illustrate your claim,

(d) found interesting and unexpected consequences of your claim,

or changed your thinking in other ways. Writing an article *should* change your thinking about the subject. Even if your bottom line remains pretty much the same, surely your understanding of the argument is now much deeper than when you started.

Rewrite the introduction using this newly acquired understanding. You'll find that the new introduction better fits the rest of the article, and that it better sells the article to the reader. In particular, make sure that you briefly mention all the important conclusions that the reader should take away from the article—not just your claim, but also the implications of the claim, such as those discussed in the last few pages.

Many readers will read only your introduction. Make sure that they get as much out of it as possible, both so they absorb more of your ideas, and so they have a higher opinion of you as a possible law clerk, colleague, co-counsel, consultant, or scholar.

b. Note all your important and nonobvious discoveries

Your article may have started as a way to make and prove one novel, nonobvious, useful, and sound claim. But in the process of writing your article, you might have found several other novel, nonobvious, useful, and sound things that you needed to say to prove that core claim. (If you have a mathematics or computer programming background, think of them as reusable lemmas or subroutines.)

These subsidiary discoveries will probably be less important than the main claim, but they may still be valuable. And some readers who are unpersuaded by the main claim, or don't find it that useful to them, may nonetheless accept and use these subsidiary discoveries.

Make sure that your Introduction lists all these discoveries, so that a reader who reads only the Introduction will learn about them, and so that a reader who reads the whole article won't miss their importance. You might even expressly note that your article makes several different though related observations. For example:

> In Part III, I argue that these speech restrictions imposed in child custody cases are unconstitutional, except when they are narrowly focused on preventing one parent from undermining the child's relationship with the other; and the observations that lead to this proposal

will, I hope, be useful even to readers who don't agree with the proposal itself. Here is a brief summary:

1. The best interests test leaves courts free to make custody decisions based on parents' speech, and to issue orders restricting their speech. Courts have taken advantage of this freedom and will surely do so again, as to a broad (and, to many, surprising) range of parental ideologies—depending on the time and place, atheist or fundamentalist, racist or pro-polygamist, pro-homosexual or anti-homosexual. The breadth of such restrictions should give pause to those who advocate exempting speech-based child custody decisions from constitutional scrutiny.

2. The First Amendment is implicated not only when courts issue orders restricting parents' speech, but also when courts make custody or visitation decisions because of what parents have said to the child, or are likely to say to the child. And just as the Equal Protection Clause bars child custody decisions that discriminate based on race, so the First Amendment presumptively bars child custody decisions that discriminate based on a parent's constitutionally protected speech.

3. Even when the parents' speech is religious, the Free Speech Clause is probably a more important protection for the speech thau the Religion Clauses are, though nearly all the scholarship and most of the litigation has neglected the Free Speech Clause.

4. If parents in intact families have First Amendment rights to speak to their children, without legal prohibitions on speech that is supposedly against the child's "best interests," then parents in split families generally deserve the same rights, except when the speech undermines the child's relationship with the other parent.

5. Parents in intact families should indeed be free to speak to their children—but not primarily because of the parents' self-expression rights, or their children's interests in hearing the parents' views. Rather, the main reason is that today's child listeners will grow up into the next generation's adult speakers. That next generation is entitled to hear a broad range of ideas, without government interference; restrictions on ideological parent-child speech are a powerful way for today's majorities or elites to entrench their ideas, and to block their ideological rivals from being heard in the future. The First Amendment is a necessary check on this entrenchment.

6. It may seem appealing to protect speech generally, but to withdraw that protection when the speech imminently threatens psychological harm to the child. But such an approach will likely prove unhelpful: It's hard for courts to reliably predict whether speech will cause harm, to reliably determine whether certain existing harm was indeed caused by speech (as opposed to by the breakup itself, or by the other parent's condemnation of the speech), and to weigh the present

upset caused by certain teachings against the teachings' potential long-term benefits.

These points are related, and they help prove the article's overall claim. But some of them are also independently valuable.

The descriptive item 1 may be interesting even to people who aren't persuaded by the article's prescription. Item 5, which speaks more broadly about parental speech rights—even outside child custody decisions—may be useful to people who are writing articles on this broader theme. Item 6, which criticizes the "protect speech unless it's harmful" option, may be worth highlighting to people who quickly accept the notion that parental speech should be protected, but who assume that of course the speech may be restricted when it is harmful.

Your article likely has many subsidiary findings like this. Make sure that you properly highlight them.

6. The Conclusion

The conclusion is where you remind people of the value that your article has added to the debate. Briefly summarize your claim, and the most important subsidiary conclusions. But keep it quick—the reader is looking forward to being done.

C. Turning Practical Work into Articles

Writing an article from scratch can be daunting. Fortunately, you can often save time and effort by adapting work you originally wrote for another purpose—for instance, for a summer law firm job or a judicial externship.

Not all such work can be turned into a good article; some lacks novelty or nonobviousness, the stress in the real world being largely on utility. But much practical work does focus on largely unexplored questions, as you might have found if you searched for relevant law review articles before starting to write. And though memos and motions are generally shorter and shallower than a good law review article, that can be remedied.

The trick is to ruthlessly strip away those things that are unsuitable for law review articles, and to add the material that you never included because it was unsuitable for practical work. I recommend a four-step approach: Extract, deepen, broaden, and connect.

1. Practical work often covers issues that were important to the case on which you were working, but that aren't new or academically interesting. *Extract* those portions that would be a valuable addition to the literature, and throw out the rest.
2. Practical work often glosses over counterarguments and omits significant steps in the analysis. *Deepen* the work by confronting the hard questions that the original work avoided.
3. Practical work is generally tied to particular facts, a particular jurisdiction, or a particular procedural posture. Make it more useful by *broadening* your discussion.
4. Practical work tends to ignore (for good reasons) broader academic debates. Make your article more academically impressive and perhaps more useful to later scholars by *connecting* what you've written to these debates.

Ethical note: Before turning a law firm memo into an article, get permission from the firm. Most firms will want to make sure that you aren't inadvertently including confidential client material, but some might also not want you to share work that they paid for (and in which they own the copyright). Few articles are worth ruining your relationship with a prospective employer, or with a likely reference for future employment. Likewise with work you've done as a judicial extern or a law clerk.

If you're getting class credit for your work, you should also disclose to your advisor or seminar teacher that you want to base your paper on some material that you had written before. Some professors might balk at that, because they may think that you should only get credit for work that you've done specifically for school. That's the professor's prerogative, and you'll be glad that you checked with the professor up front, rather than having him learn this later, and accuse you of chicanery and of violating academic standards.

But other professors might recognize that turning a practical piece into an academic one itself requires a lot of work, and they would thus have no objection to your proposal—especially if you show them the original memo, with a brief but impressive discussion of the many things that you plan to do to it.

1. Extract

Find the material in your work that's novel and nonobvious. (Don't

worry so much about utility; if the work was useful in one case, it will probably be useful in others like it.) Many cases involve some issues that have rather simple or at least not very interesting answers, and other issues that are more worthy of academic treatment.

Cut mercilessly. Remove any subtopics for which you think you can't really add any academic value. Don't worry if the result looks too short; you'll solve that problem in the next three steps. The important point is that your paper should contain maximum value added, and minimum repetition of what others have already said.

Some memos contain several interesting issues that arose in the same case but aren't inherently connected—for instance, a jurisdictional question and a largely unrelated substantive question. Split them up. Better to have several short articles, each with a coherent internal structure, than one long article that contains several essentially unrelated matters.

2. Deepen

Practical work encourages you to take certain shortcuts. Replacing these shortcuts with more thorough analysis will make your article deeper, more valuable, and more impressive.

a. Question existing law

If the case law in your state or your federal circuit is settled, your law firm memo or judicial externship bench memo generally isn't supposed to analyze whether the decisions are sound; it's supposed to work within the existing framework.

Not so for law review articles. Articles are generally addressed to a national audience, and other states or other circuits may be free to adopt a different rule. And an article may also argue that the Supreme Court, state supreme courts, or federal circuits sitting en banc should change even a settled rule—an argument that most practical memos rarely make.

So don't just say, "this result is right because *X v. Y* and *Z v. W* have so held." Instead say, "this result is right because it fits with these general principles (whether doctrinal principles or policy principles), and courts have indeed seen it this way (citing *X v. Y* and *Z v. W*)." Or feel free to say, "this result is right because it fits with these general princi-

ples; some courts have disagreed, but here is why they're wrong."

b. Take counterarguments seriously

Briefs often gloss over some counterarguments, whether because the counterarguments are so weak that they aren't worth discussing given the page limit, because they're so strong that the supervising lawyer prefers not to stress them, or because you think that this particular judge won't care much about them. Law review articles, on the other hand, are generally strengthened by a full discussion of the counterarguments.

Go through your work carefully and look for all the fudging. When you say, "because X is true, Y is true," is there a missing step? Is there a counterargument that you haven't confronted? Are you entirely persuaded by your own writing?

Resist the temptation to take the easy way out. Your article should aim to impress readers with your thoughtfulness and fair-mindedness; the best way to do that is to confront the hard counterarguments, not ignore them.

c. Reflect on your initial goal

Practical work is often constrained by its procedural posture. What should a prudent client do to avoid any chance of liability under a vague rule? What's the best place to file a particular case?

Ask yourself whether it's good that lawyers are asking these questions. For instance, maybe the legal rules shouldn't be so vague that they pressure people into taking the most conservative path; you could use the suggestions from your memo as illustrations of the rule's vagueness. Maybe the legal system should discourage forum-shopping in this context; you could use the discussion from your memo to show how the choice of forum makes a big difference.

Remember: You're no longer locked into the particular assignment you were given. You should take advantage of the time and effort you've invested in your work, but build on the work by thinking beyond the specific problem you were originally trying to solve.

3. Broaden

Practical work usually focuses on a particular fact pattern and a particular jurisdiction. While you want your article to be narrow enough to be manageable, you also want to make it more useful, and that means making it applicable to as many cases as possible.

You can often generalize your analysis with fairly little extra effort. Say your work dealt with only one state's law; usually the law in many other states will be similar. Turn your article into something that focuses on general U.S. law, or at least the majority (or even minority) rule.

You can still use the cases from your state as illustrations and as support for your argument. You'll need to do some more research on just how similar the law in the other states really is, but that tends to be considerably easier than researching a new subject from scratch.

Similarly, see to what extent you can easily generalize your fact pattern. Say your memo was about the remedies for unauthorized publication of the fact that someone is HIV-positive. You can probably broaden the work to cover unauthorized publication of the fact that someone has any medical condition that would lead some to shun him.

You might have to add a bit more analysis—there may be legally significant differences between HIV status and other medical conditions—but this may mean only a bit of extra work. Broadening the subject to "remedies for any unauthorized publication of private facts," however, would likely be much harder (and might therefore not be worth doing) because so much of your original analysis was likely to have been tied to your focus on a medical condition.

4. Connect

Finally, your work may profit from connections to debates in related areas (see Part I.B.4, p. 61), and these connections may even shed light on the proper outcome of those debates. Briefly but cogently discussing such connections can make your piece more useful and more impressive.

D. Budgeting Your Time

Students often find themselves running late on their papers, and as a result having to cut corners at the end of the semester. Try to avoid

this by focusing up front on what you need to do, and when you need to finish it by.

Here's a sample plan and time-chart that you can use. (Some date boxes correspond to several steps, because those steps need to be done together.) Note that you should budget a *lot* of time—many weeks—for writing, and less time for research. The bulk of the work is always in the writing.

Step	**Target Completion Date**
Identify a problem to be solved	
Create the test suite that you can use to test your claim	
Research: Read the articles that bear on the problem, to get an idea of what your claim should be, and to make sure that there's still something novel left for you to say	
Research: Read the cases, statutes, studies, and other original materials that bear on the problem	
Update the test suite to reflect new aspects of the problem that you found in your research	
Come up with a tentative claim	
Apply the claim to the cases in your test suite	
Refine the claim in light of the test suite	
Repeat the preceding three steps until you're satisfied	
Write the introduction	
Write the short summary of the background law; if you prefer, save this until after you write the proof of your claim	
Write the section that proves your claim, starting with the zeroth draft (see Part IV.A, p. 102)	
Keep refining your claim as you write	
Write the conclusion	
Polish the writing and the structure (many editing passes)	
Rewrite the introduction to reflect the changes in your thinking, both about your claim and about how best to present it	
Hand in the first draft to your professor or to your law review Notes Department editor, and to any friends who have agreed to help you with it	
Wait for readers' comments; while you're waiting, polish the writing, structure, and substance on your own	
Fix the substantive problems identified by readers (likely to be many)	
Polish the writing and structure in response to the readers' comments (several editing passes)	
Hand in the second draft	
Wait for the readers' comments; while you're waiting, polish the writing, structure, and substance on your own	
Fix the substantive problems identified by readers	
Fix the footnotes, fill in the citations that you originally omitted, find sources that you haven't yet found, and generally fill in all the blanks that you saved for later	
Polish the writing and the structure in response to the readers' comments (several editing passes)	
Update the introduction to reflect further changes in your thinking	
Hand in the final draft	

E. Deciding What to Set Aside

"A poem is never finished, only abandoned."

—Paul Valery

For many articles, there's no clear theoretical stopping point. You can always discuss other interesting legal issues that relate to your core claim—for instance, if you're writing on a substantive free speech issue (e.g., the tension between the First Amendment and hostile work environment harassment law), you might see some interesting procedural questions that this raises: Should injunctions barring harassing speech be treated as prior restraints? Should there be independent appellate review in harassment cases that are based on speech?

Sometimes your running out of time or patience makes the decision for you. But if it doesn't, how do you know when to set these interesting points aside?

There's no clear answer to this, but my suggestion is to (1) thoroughly discuss your main claim, and then (2) have a short section that identifies and broadly outlines the other points, but doesn't fully resolve them. Generally, if you discuss your main claim in enough depth, you'll have a nice, substantial piece. Adding a thorough investigation of the tangents is unnecessary.

But flagging these tangents as interesting avenues for future research, and briefly giving some tentative thoughts on them, can help enrich your article and make it more relevant and useful. The very fact that your main topic raises these related questions can help show that the topic is important.

Make especially sure that you flag the implications of your claim, or of your framework for resolving the claim. These help show the importance not just of your topic (which existed before you started writing), but also of your analysis, which is your own contribution. If, for instance, you develop a test, briefly discuss where else the test, or tests like it, might be applied. If you develop a categorization scheme, briefly flag where else it could be helpfully used.

How brief should these tentative discussions be? That's a judgment call; you want them to persuade the reader that there's something interesting there, but you don't want them to get long enough that they make your article unnecessarily bulky and take up too much of your time. Four tips:

1. Ask your faculty advisor for advice, but *after* you've handed in the rough draft of your main discussion. Before you deliver the draft, the advisor won't be sure that you're able to handle even the core claim, much less the tangents.
2. Make clear at the start of the section that these points are avenues for future research, and that you will be discussing them only briefly. People's evaluations are related to their expectations: If they are warned that the discussion will be brief, they'll be less likely to be bothered by its brevity.
3. How substantive the digressions must be turns on how substantive your core argument is. If you deal thoroughly with your main claim, readers will be more likely to assume that your tangentially raised points are interesting, and that you would have dealt with them well if your article had been more focused on them.
4. Be prepared to delete these digressions—or to save them for a future article—if readers tell you that they're unpersuasive or distracting.

Finally, note that this has to do with how *broad* you make your article—how many related issues you choose to cover. If you have an opportunity to make your article *deeper*, by better justifying more of your arguments, do so (at least unless you think your justifications will be redundant). Inadequately supported assertions, or even assertions that are supported by the doctrine but not fully defended on policy grounds, make your argument weaker.

F. Choosing a Title

A title should do three things. Most importantly, the title should *persuade people to read the article*. When busy people do a Westlaw or Lexis search that yields fifty items, how do they choose what to read? They look at the authors' names and at the titles. If the title looks helpful—not necessarily exciting, but helpful—they'll read further. The title is your opportunity to get people to devote time to at least reading the Introduction.

Second, the title can *frame people's thinking* once they start reading your piece. If a title focuses the reader on a concept, the reader is more likely to keep that concept in mind.

Third, the title can *help readers remember your article*. Remember, though, that a memorable title is of little use to you if it wasn't attractive enough to get people to read the piece in the first place.

So how should you choose your title? Let me suggest the following approach.

1. *Start with a descriptive title*, which summarizes the general question that your article is answering (though not necessarily your specific answer). If a person's query comes up with an article called "Freedom of Speech and Workplace Harassment," the person will have a good sense of the article's substance. Naturally, the title can capture only a small part of your point, but it can capture enough to give readers some idea of whether the article is relevant to their interests. Purely descriptive titles might not be that memorable, and might not much help frame readers' thinking, but they're good at getting people to read the piece.

Of course, it's not enough that your title be comprehensible to you; *make it comprehensible to your readers.* I named one of my articles "Test Suites," but late in the publication process realized that few readers would know what that means. Renaming the piece "Test Suites: A Tool for Improving Student Articles" made the purpose and value of the article clearer (though I think the title could have been made better still).

It's acceptable for an article to have *a subtitle as well as a title.* This can let you communicate two ideas, one general and one more specific. For instance, "Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop Others from Speaking About You" conveys both a general point (the article is about the First Amendment problems with information privacy laws) and a specific one (the problems arise because "information privacy" really refers to a supposed right to stop others from speaking about you). The combination is long—perhaps too long—but it takes advantage of its length. Likewise, "Academic Legal Writing: Student Notes, Law Review Articles, Seminar Papers, and Getting on Law Review" gives people a short summary (the book is about academic legal writing) but also tells them that it's useful for four different purposes.

2. *If your article focuses on a particular concept—and especially if it pioneers the concept—include the concept in your title.* Say you're writing an article about laws requiring passersby to help strangers whom they see to be in peril. Your main thesis is that these laws might have the perverse effect of *discouraging* some people from cooperating with the police; but you also think this broader idea of anticooperative effects of law deserves more attention in other contexts as well.

"Duties to Rescue and Anticooperative Effects of Law" may be a good title: It tells potential readers that your article is both about duties to rescue and about the general problem of law discouraging cooperation with the authorities; it focuses readers' attention on the concept of "anticooperative effects"; and it gives them a phrase that they can remember the article by. My colleague Ken Karst, for instance, pioneered the term "The Freedom of Intimate Association" in a *Yale Law Journal* article with that title, and now the phrase is a well-established part of constitutional jurisprudence.

3. *If you have a witty play on words that you'd like to include in the title,* now is the time to consider it. I try to avoid such titles in my own work, but I concede that a little wit can make the article seem more appealing, can put the reader in a good mood, and can help the reader remember the article later. I still remember an article title I saw in the

early 1990s, "One Hundred Years of Privacy"—this both communicated the article's essence (a look back on the privacy tort a century after Warren and Brandeis first proposed it), and humorously alluded to the novel "One Hundred Years of Solitude."

Another article was called "A RFRA Runs Through It," echoing the title of the movie "A River Runs Through It." People who are familiar with religious freedom law know that RFRA is the Religious Freedom Restoration Act, commonly pronounced "riff-rah," not that different from "river." The article's thesis was that after the enactment of the federal RFRA, the entire U.S. Code should be read as if RFRA had amended each statute, and changed the policy balance struck by the drafters of each statute—hence RFRA runs through the entire Code, so the joke is apt. Plus the article was published in a symposium conducted by the *Montana Law Review*, and the movie was set in Montana. Cute.

But be careful! First, amateur comedians notoriously overestimate how funny their jokes are.

Second, with some topics (abortion, the death penalty, and the like), some readers will find any humor to be jarring. For instance, "Creole and Unusual Punishment: A Tenth Anniversary Examination of Louisiana's Capital Rape Statute"—a real title—contains a pun that's amusing in the abstract; but, when applied to the death penalty, the joke might alienate more readers than it amuses. It's hard to know for sure, but you should at least consider the risk.

Third, even an amusing gag distracts the reader from your main point. To be effective, the joke must be interesting and memorable enough that its value overcomes the distraction.

Fourth, some writers find a joke so appealing that they use it even when it doesn't quite capture the point they are trying to make, or when it is surplus that doesn't add anything valuable. Better use serious words that mean exactly what you need to say, no more and no less, than a joke that means something slightly different, or that takes up words that could be used for something substantive. Humorous subtitles are common offenders here: They often add nothing besides the joke, and the joke's place can often be effectively taken by a subtitle that actually communicates something useful about the piece.

So reread the title on several occasions to make sure that the gag really works, and ask friends whether they agree. If you're in doubt, err on the side of having a purely substantive title.

4. *Edit the title even more carefully than you edit the rest of your work.* Clarity, proper word choice, and liveliness are especially important in a title, both to make people more interested in reading the piece, and to set the right tone for their reading—if the title sounds clunky or abstract, people will expect the rest of the article to be the same. Thus, for instance, "Considering the Advantages and Disadvantages of Prohibitions on Concealable Firearms" isn't as good as "The Costs and Benefits of Handgun Prohibition." The "considering the" is surplus; "costs and benefits" is shorter and simpler-sounding than "advantages and disadvantages"; and "handgun prohibition" cuts out an unnecessary prepositional phrase, and recasts the abstract "concealable firearms" as the concrete "handguns."

5. *Generally, avoid case names.* Just as the article should usually be about a topic and not just a particular case (see Part I.A.8.b, p. 35), so should the title. First, the case name might not be familiar to some readers, unless the case is extremely famous; a reader might be interested in the general subject, but might not connect the case to the subject. Second, stressing a particular case makes your claim seem narrower and less useful.

Sometimes, a case may be so important and controversial that many readers will want to read articles about it—referring to the case name will then draw more readers than it will repel. But generally speaking, titles should be about concepts, not cases.

6. *Generally, avoid jargon, little-known legal terms, and statutory citations.* Readers may also be put off by titles with little-known legal terms, statutory citations (unless they're extremely well-known, such as "Title VII" or "42 U.S.C. § 1983"), and jargon, whether it's drawn from economics, literary criticism, feminist studies, libertarian philosophy, or what have you. Many readers will be interested in the general topic, but will not fully understand the terms; and when the query gives them those fifty titles, they'll choose the ones they understand rather than the ones they don't. Again, there may be exceptions, for instance if the substance of your article will only appeal to those people who know the jargon—then, the technical terms may attract exactly the readers you want. But usually, stick with plain English.

7. *That other articles have silly or mystifying titles doesn't mean yours should, too.* Well-known authors can get away with less descriptive titles, since people will read their pieces because of the author's name, not the article's name. You don't have that luxury.

Here's an example. You decide to write an article about whether

compulsory licensing of copyrighted musical compositions makes sense, using the recently decided *Allman v. Capricorn Records* as a starting point. Don't start with "Compulsion or Anti–Monopoly?" or "Licensing Fair and Foul," or, heaven forbid, "Copyright and § 115: Is *Capricorn* a Sign of the Times?"

Rather, (1) start with a descriptive title, such as "Copyright and Compulsory Licenses" or "Compulsory Licenses in Copyrighted Musical Compositions." These aren't exciting, but people who see the title will know whether the piece is likely to help them.

Then, (2) see if there are any other basic concepts around which your article is oriented. For instance, if you argue that compulsory licenses make copyright a form of "intellectual quasi-property," rather than true property, mention that concept in the title: "Compulsory Licenses in Copyrighted Musical Compositions: Intellectual Quasi–Property as a Remedy for Transaction Costs." This is especially so if you're trying to pioneer the concept of intellectual quasi-property.

If you do want to rework the title to (3) include some pun or witticism, now is the time to do it. This way, you have the descriptive title in front of you, and can compare it with the amusing alternative. If the amusing version is clearly better, go with it. But if it's not better—and it probably won't be better—then stick with the purely substantive title.

Now (4) see if you can make your title shorter, clearer, and more forceful. Does the subtitle really add enough value to the title? Do you really need the word "Compositions," or will the title be clear enough (and less technical-sounding) without it? Do you really need the word "Copyrighted," or will that be obvious, since virtually all musical compositions are protected by copyright? (I think "copyrighted" is probably helpful, because it makes it clearer to the casual reader that the article is about copyright law.) Can you make the title sound more active, perhaps "Compulsory Licenses in Copyrighted Music: Fighting Transaction Costs Through Intellectual Quasi–Property"? I'm not sure what the best title would be, but I am sure that you should spend some time editing it.

You don't have (5) any case names here, and you probably don't need them. "Transaction costs" is a bit of (6) economics jargon, but it's so well-known that it's probably worth keeping, especially since there's no really good synonym. You don't have any technical legal terms or statutory cites, which is good: If your title had been "17 U.S.C. § 115: Fighting Transaction Costs Through Intellectual Quasi–Property," you should have changed it to our working title ("Compulsory Licenses ...")—many readers, even ones who know something about copyright

law, might not be sure what § 115 covers.

So you now have a pretty good title. It's not exciting, but it should get the job done. Someone who is interested in compulsory licenses and who comes across a piece labeled "Compulsory Licenses in Copyrighted Music: Fighting Transaction Costs Through Intellectual Quasi–Property" will probably think it's worth looking at—and that's the title's main function.

G. *Summary*

1. Choose a topic

Choose an area that you find interesting, and that your faculty advisor thinks is a fertile ground for novel, nonobvious, and useful ideas. Find a problem in that area. Do research to learn more about the problem, and to figure out the possible solutions. Be open to switching to another problem if your research leads you to something more interesting or productive.

2. Make a claim

Figure out what claim you want to make—what you think is the best solution to your problem. Formulate it in one or two sentences. If your claim is prescriptive, design a test suite based on the factual scenarios that you've identified in your preliminary thinking, and refine the claim in light of what you learn from applying it to your test cases. Use the pointers in Part I.A to make the claim more novel, nonobvious, and useful.

Do your research (see Part III). Modify your claim in light of your research. Try to make your revised claim still more novel, nonobvious, and useful.

3. Write a first draft

Write an introduction. If you can't do that, you're probably not ready to write the draft—you're probably not yet sure what you want to say or how you want to say it. Look over Part I.B.1, p. 39, for some pointers.

When you're done with the introduction, write the rest of the article. In this phase, don't stop when you find yourself blocked on one section. Just get a draft out, even if it's rough and incomplete in spots. As you write, be open to revising your claim further.

Rewrite your introduction in light of what you've learned while writing the draft. Try to enrich your article by discussing connections to related issues.

4. Edit

Go through as many drafts as you can, polishing each paragraph, each sentence, and each word. Look over Part IV for some pointers.

Also go back over Parts I.A and I.B.4. Can you make the piece more novel, more nonobvious, and more useful? Can you tighten up its organization? Can you sell it better in your introduction? Can you add further interesting connections?

At some point in the editing process—preferably as early in the semester as possible—give a draft to your faculty advisor for comments. Also ask for comments from some friends whose judgment you trust. Don't wait on this until it's too late.

5. Publish and publicize

See Part VII.

6. Think about your next article

See Part VII.E.

IV. WRITING

This short chapter is surely no substitute for years of learning to write well, and for your first-year writing class. Still, here are some items that I've found to be particularly relevant to academic writing.

A. Try Starting with a Zeroth Draft

One way to get a first draft done is to begin with what I call a "zeroth draft"—something halfway between an outline and a first draft. Here's one way of doing this:

1. Start by writing a fairly complete Introduction, if you can. For the reasons I mention in Part I.B.1 (p. 39), the Introduction can help you get a better grasp of what you're trying to say.

2. Lay out in your document the structure that you anticipate for the rough draft, including the section and subsection headings.

3. For each subsection, start by writing a sentence or two summarizing the argument in the section. For instance, if you're writing about the First Amendment and workplace harassment law, one section might read:

> *A. Fighting Words*
>
> Workplace harassment law can't be justified using the "fighting words" exception because it isn't limited to speech that isn't face-to-face, and isn't likely to immediately start a fight.

4. Then, when you've filled in all the subsections that you can (or if you're blocked on what to write in some subsections), go back over the one-sentence summaries and expanded them to a paragraph or two, for instance:

> *A. Fighting Words*
>
> Workplace harassment law can't be justified using the "fighting words" exception because it isn't limited to speech that isn't face-to-face, and isn't likely to immediately start a fight. The premise of the exception isn't that all offensive speech or all insults are punishable because they offend—it's that they (i) lack value, (ii) can be restricted without interfering with valuable speech, since one can still convey the same views in other ways, and (iii) are likely to cause an immediate fight. Nothing in harassment law limits itself to this narrow category; it can just as well cover [give examples of non-one-to-one-speech].
>
> Discuss *Cohen v. California* as example of this limitation.

5. Repeat this expansion as much as you can, for instance expanding each paragraph into a couple of paragraphs, each couple of paragraphs into a full subsection, and so on.

6. Don't worry about spelling, grammar, footnotes, and the like. Feel free to use bulleted and numbered lists. Use whatever shortcuts will help you express your substantive points in as much detail as you can provide.

7. Do worry a little about statements that seem too abstract or conclusory—see if you can, in the next pass, make them more concrete or provide more support for them. But worry only a little: The difference between a zeroth draft and a first draft is that you should expect some of the zeroth draft to lack concreteness or close argument.

B. Edit, Edit, Edit

1. Go through many drafts

"Nothing is ever written," my high school journalism teacher taught us, "it is rewritten."* Aim to produce your first draft well before the deadline. This is hard, but critical.

Print the draft, edit it thoroughly, and enter the changes. Edit the draft on the printout, not on the computer; it's generally easier to spot errors that way. Set the draft aside for a day if you have the time, or for a few hours if you don't have a day. Repeat often.

Even with my writing experience, I try to do about 10 complete edits before sending an article to the law reviews. When I clerked for Judge Kozinski, the norm was about 30 to 40 drafts for an opinion, which included 20 to 30 substantive edits (the others were primarily cite-checks). Balzac supposedly went through 27 drafts of one book—and without a word processor.[11]

This is painful and time-consuming, but necessary. Your first draft will be badly flawed, unless you're a great writer, in which case it will be merely mediocre. So will the second through the fifth. As you're editing, keep some old drafts, and compare the tenth draft against the first. You will notice a vast difference.

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* Giles K. Chesterton, Beverly Hills High School.

2. If you see no red marks on a paragraph, go over it again

At least during the first few drafts, every paragraph—even every sentence—will likely need to be corrected, made clearer, and made more forceful. If you're not seeing at least one flaw in each paragraph, you're not looking hard enough.

3. If you need to reread something to understand it, rewrite it

As you're reading your draft, watch for times when you find yourself rereading a sentence or a paragraph. If your writing confuses even you, won't your readers be still more confused? And a reader who finds it hard to understand your writing will often stop reading.

"But this is complicated material," you might say. That may be right—but your job is to make the material as clear and as simple as possible. And a clear explanation should be readable in one pass: Remember, your readers aren't lazy, but they are busy.

4. Read the draft with "new eyes"*

As you read any assertion you make, ask yourself what a skeptical reader—not a sympathetic one—would say. The changes you make to satisfy this reader will enrich your argument for all readers.

Of course, this advice is easy to give but hard to follow. A few tips:

a. *For every sentence in your argument, ask "why?"* Say that your sentence is "this result would be undemocratic"; ask yourself "why is this so?" Either the sentence itself or the sentences that precede it or follow it must answer that question (unless the answer is obvious). If you don't see the answer there, put it in.

b. *For every sentence in your argument, ask "why not?"* For the same sentence, ask "why might a reasonable person think the opposite?" Might there be several possible definitions of what is "democratic"? Might there be reasons to doubt the accuracy of the assumptions that lead you to your conclusion? If you can think of a plausible counterargument, make sure you address it.

* I owe this expression to Judge Kozinski.

c. *Imagine someone whom you respect but who takes the opposite view from you*—a friend, a professor, a judge—and try to read the piece as if you were that person. What counterarguments would he come up with? Would he be impressed by your logic, or would he see some flaws with it?

d. *Get a classmate to read the draft.* The classmate must be (a) smart, (b) willing to read the piece carefully, and (c) willing to give criticism, even harsh criticism. Of course, those who like you enough to satisfy criterion (b) may be less likely to satisfy criterion (c); people who satisfy all three criteria are rare and valuable. Buy them dinner as compensation. (Warning: Check first to make sure that your professor doesn't have any objection to others reading your draft. Most professors won't, at least for your articles and probably even for your seminar papers; but it's always good to check.)

e. If you have the time, *put your latest draft away for a day or two* before rereading it, so you can come back to it with a fresh perspective.

f. *Conquer your fear.* It's natural to be afraid of reading your own work critically. What if your claims are all wrong? What if you find the killer counterargument? What if you have to start over?

The fear is understandable, but nearly always unfounded. If your claim is flawed, you can correct it. Most counterarguments are answerable, and if you find one that isn't, you can amend your claim without throwing everything out. Your draft represents a lot of research and thinking. Even if you have to revise it dramatically, you'll still be able to use the bulk of what you've written.

And if you figure out that your claim is wrong, then your readers—including those who will grade your work—will too. Better fix the claim before you turn in the article.

5. Edit with the attitude that there are no lazy readers—only busy readers

Many writing tips stress simplicity, clarity, and brevity. Avoid unnecessary long words and complex sentences. Get to the point quickly. Keep paragraphs short. Make things easier for your readers, and keep them from losing interest.

Some writers think this advice assumes that readers are lazy or stupid; those writers feel they're being told to "dumb down" their prose for dumb readers. After all, smart, industrious readers wouldn't mind

long paragraphs filled with long sentences and long words—they would focus on the substance, not the form.

No. Your industrious and smart readers are busy people, precisely because they are so industrious and smart. They can spend only limited time and effort reading your article—not because they're lazy or dumb, but because they have other things to do.

They can parse complex words and sentences; but this parsing takes more work than reading simpler, clearer prose. Why waste my time wading through this morass, they'll ask themselves, when I could be working on something else? You can keep their precious attention only by making things as easy for them as possible.

C. *Finish the First Draft Quickly / Defeat Writer's Block by Skipping Around*

Sit down and write the first draft. When you get blocked on one section, go on to the next. If you need to leave a subsection for later, that's fine. If you feel that the best you can do is outline a section, or write a few unconnected paragraphs, do that.

Just keep going forward, and don't let your difficulties with one part interrupt the whole writing project. Usually, even if you're bored with one section or confused about what you want to say, you'll be invigorated by moving to another part of your argument. And once you have the first draft done, no matter how rough it is, revising it and filling the gaps will probably be much easier.

Your producing a first draft quickly, and then quickly improving and completing it, will also give your faculty advisor more time to give you useful feedback, and maybe to read through more drafts; and it will make you look industrious and disciplined—which is how you want the person who's grading your work to see you.

D. *React Effectively to Editing Suggestions*

Once you've gone through several drafts, your professor may be willing to read your work and give you advice. Different professors operate differently: Some may be reluctant to read any rough drafts, especially for seminar papers, while others will be willing to read at least one such draft, or even more. Some may give you only general comments about

the substance, while others may also edit your writing, at least in one or two sections. A few suggestions:

1. *Ask the professor up front* (a) whether he will read over a rough draft, and also (b) whether he will give you suggestions about your writing as well as about the substance. Sometimes, if you ask nicely enough—in a way that makes it clear that you really want to improve your writing—the professor will agree to more than he might have otherwise offered.
2. *Give the professor a draft that you've already closely proofread.* First, you want the professor to identify the problems that you wouldn't have found on your own—the problems that remain after several edits that you yourself did. Second, badly written prose is hard to read, and the harder the draft is to read, the less closely the professor will read it. Third, the professor may feel that you're wasting his time by asking for comments on material that you haven't already edited yourself. You don't want your editor, or your future grader, to think that.
3. *Give the draft to the professor as early as possible.* This is in some tension with #2, but you need to keep both goals in mind. It will take time for the professor to read your draft and give you thorough comments—and this won't be the only task on the professor's schedule. The earlier you hand in the draft, the earlier you'll get the feedback, the more time you'll have to react to it, and the easier it will be for you to persuade your professor to read another draft. And you don't want the professor to feel rushed, because that will yield less thorough comments.
4. *Treat each editing comment as a global suggestion, not just a local one.* If the professor circles one "it's" and tells you that it should be an "its," check *all* the "it's" in your paper—you've probably made this mistake more than once.

   Do the same for broader comments. Professors reasonably assume that once you see a few sentences marked "redundant" or a few paragraphs marked "too long," you'll understand that your prose needs trimming. They might not take the time to mark all the other instances of these problems.

   So as you read the marked-up draft, keep a checklist of the kinds of problems that the professor found. Then, focus your next edit on identifying and correcting more examples of each problem.

E. Use Subsection Headings

Readers find subsection headings helpful: Even if your article is well organized, readers might at times lose sight of the structure, and subsection headings can bring the reader back on track. Try to choose headings that refer to your specific argument (such as "Identifying Speech That Lacks Value When Communicated to Minors"), rather than generic ones such as "Background" or "Applying the Test."[12] Subsection breaks also provide extra white space on the page, which seems to make text more appealing to many readers.

But the main value of these subsection breaks is to help you organize your own thinking. If you break up a section into five subsections, giving each a topical heading, you'll be more likely to see organizational problems, such as shifts from one issue to another and then back to the first, or digressions that break up the article's logical flow.

Naturally, there will be some overlap among the subsections within each section. But to the extent possible, you should completely cover each detail within a few adjacent pages, rather than returning to it repeatedly throughout various parts of the article. Readers find it hard to grasp an argument that's made in five chunks in five parts of the paper. They'll need to do this for your broad argument, which will indeed pervade the whole article. Don't ask them to do the same for the more detailed arguments.

Good places for subsection breaks are usually easy to spot. For instance, when you're dealing with a multi-prong test, it generally makes sense to have a subsection for each prong, even for a prong that takes only several paragraphs. Many multi-pronged tests actually have several subprongs contained within each prong; consider having a subsection for each of these subprongs. Be willing to have subsections that go four or five levels deep.

If you're discussing several factual scenarios, policy arguments, or statutory sections, consider having a separate subsection for each one. Err on the side of having more subsection breaks rather than fewer.

After you're finished, you might decide to delete some of the lower-level subsection headings, especially if the subsections are very short, and the structure of the broader section is clear. Still, the headings will have served the goal of helping you write the article, even if they won't be needed to help the reader read it.

F. Use a Table of Contents

Most word processors can easily produce a table of contents from your section headings. Use this feature, partly to help the reader, but mostly to give you an overview of the article's structure as the headers reflect it. The table of contents may help show you some missing steps, or some redundancies.

The table of contents can also point out inconsistencies in your headings. Check, for instance, that you consistently use upper and lower case, and that the headings in each section are grammatically parallel.

Make sure that you use the editing commands needed to make the automatic table of contents work: In Word, for instance, use the Heading 1 through Heading 5 styles to set up the headings (control-alt-1 to control-alt-4 are usually configured as keyboard shortcuts for Headings 1 to 4) and when you insert the table of contents, ask for it to show up to 5 levels, and not just the default 3.

G. Note Down All Your Ideas

As you write, you'll often get interesting ideas that you can't act on immediately, for instance because they relate to another section or to something that you should research.

Write down these ideas before you forget them. I prefer to record them in my main document—either in the computer or on the printout that I'm editing—tagged with some text, such as "**." You can put them into the section where they'll ultimately be discussed, in a master "to do" list at the top or bottom of the document, or even in whatever text you're currently writing. Because they're specially marked, you can easily find them later; and because they're written down, you won't lose what might be a great thought.

Likewise, at the end of a writing session, always write down what you plan to do next.[13] That way, you won't lose your train of thought, and will find it easier to start the next session.

H. Things to Look for: Logic

1. Categorical assertions

Avoid "never" and "always," as in "this law would be completely unenforceable" or "could never be enforced." Completely? Never? Really? Modest claims may sometimes seem less rhetorically effective, but they're more likely to be right.

2. Insistence on perfection

People often criticize laws by arguing that they're imperfect: "The law is targeted at preventing children from accidentally killing themselves or other children with a gun. However, the law itself would not adequately protect against all of the possible accidental handgun deaths."*

This is a weak criticism. No law can prevent *all* instances of a certain kind of harm. The questions are usually whether the law does more harm than good, and whether other alternatives can do still better. You can't avoid these hard questions merely by showing that the law doesn't always do the good that it's meant to do.

More broadly, be careful when you implicitly assume that the world is neatly divided into two categories—for instance, perfect laws and pointless laws. Such divisions often ignore the existence of a third category, such as laws that do something but not everything.

3. False alternatives

"Is pornography free speech or hate speech?" "Are race-conscious affirmative action programs permissible or discriminatory?" "Was this speaker's motivation artistic or commercial?" "Should American foreign policy aim at making other countries fear us, or at getting them to work with us?"

The trouble with these either-or questions is that the answer may well be "both." Pornography might qualify as "hate speech" under some

* This quote and most of the others in this chapter are drawn from real papers and articles that I've read.

definition, but still be constitutionally protected. Race-conscious affirmative action programs might be discriminatory and yet constitutionally permissible. Speakers may want to both make art and make money from it. American foreign policy might aim at making some countries work with us by making them fear us.

Asking "X or Y?" tends to suggest that the answer must be one or the other. If this suggestion is incorrect, then asking the question will confuse the reader, and may make your argument unsound. And if you do think that X and Y should be mutually exclusive—that, for instance, hate speech should never be protected by the Free Speech Clause—you should demonstrate this mutual exclusiveness, rather than just assuming it by posing the "X or Y?" question.

4. Missing pieces

A logical argument should consist of several steps that fit together, for instance: "All As are Bs. X is an A. Therefore, X is a B." Legal arguments aren't exercises in formal logic, but they must still fit logically, with no unproven connections.

Say your argument looks roughly like this:

(a) Classifications based on sex are subject to the most exacting scrutiny.

(b) Separate schools for boys and girls involve classifications based on sex.

(c) Therefore, separate schools for boys and girls are unconstitutional.

The pieces don't quite fit: Points (a) and (b) prove only that separate schools are subject to the most exacting scrutiny, not that they are unconstitutional. You must fill in the missing piece, by showing that the classification fails the exacting scrutiny.

Before writing your proof section, and again after finishing it, summarize each significant assertion in one sentence, much like the list I've just given. Then see if the assertions fit each other. If they don't fit together on your list, they probably don't fit together in the paper.

5. Criticisms that could apply to everything

It's not enough to say that a law "has a chilling effect," or "starts us

down the slippery slope," or "imposes the majority's morality on the minority," or "intrudes on people's privacy." Most laws that constrain people's conduct—murder laws, antidiscrimination laws, bans on cruelty to animals—impose the majority's morality on the minority; sometimes that's good. Many laws have chilling effects or intrude on people's privacy; but we often tolerate this because these laws' good effects outweigh the bad. Almost every law potentially starts us down some slippery slope, but that's not reason enough to reject it.

Be specific. Explain why this chilling effect is worse than other chilling effects that we're willing to tolerate (and what exactly you mean by chilling effect). Explain why this slope is more slippery than others, or why it's wrong to impose this particular kind of moral principle on people, or why this intrusion on privacy is unjustified even though other intrusions are permissible.

Whenever you criticize a law, especially when you do it using generalities, *ask yourself whether the criticism could equally apply to laws that you endorse.* If it can, refine your criticism to make clear specifically why this law is bad when the others are good.

6. Metaphors

Metaphors can make your writing more vivid, but they can also hide logical error and incompleteness.

Metaphors are literally false. Societies do not literally slip down slopes. Laws do not literally chill speech. These terms have some truth to them, but only to the extent that they describe *concrete mechanisms* and not just abstract metaphors. When we say "slippery slope," that's shorthand for "this seemingly unobjectionable decision may cause other, much more troublesome decisions in the future." When we say "this speech restriction has a chilling effect," that's shorthand for "this speech restriction may deter certain speech even though the restriction ostensibly doesn't cover that speech."

Once you unpack the metaphor this way, you can see that you need to support it with a more concrete explanation. Why would this decision lead to other decisions in the future? What speech would be deterred by this restriction, and how?

Many people omit these explanations, perhaps because the metaphors sound self-explanatory. In the physical world, we can say "Watch out for that driveway—the slope there is slippery" without further explanation, because we know the mechanism that underlies the slippery slope: It's gravity coupled with inadequate friction.

But these physical mechanisms obviously don't carry over to slippery slopes in law; so when we use the term "slippery slope" metaphorically, *our argument is incomplete unless we give more details* about what the metaphor really means. Whenever you see a metaphor, ask yourself, "To what actual phenomenon does this figurative usage refer?," and describe this phenomenon. If you think the metaphor helps people understand your point, you can still keep the metaphor as well as the actual description. But remember that the heart of your argument should be the real, not the figurative.

7. Undefined terms

Look skeptically at any abstraction that you mention but don't specifically define, such as "paternalism," "democratic legitimacy," "fundamental fairness," "evolving standards of decency," "narrow tailoring," "good faith," or the like. These abstractions can be useful, but they are vague enough that (1) the reader might not clearly understand what you mean by them, (2) you yourself might not clearly understand what you mean by them, and (3) you risk using them to mean different things in different cases.

Make clear what you mean by each term: What constitutes paternalism (whether good paternalism or bad)? How do you decide what's democratically legitimate and what isn't? Does "fundamental fairness" refer to an existing body of law that defines the term, or just to your moral judgment? If it's the latter, what is that moral judgment, and why is it right? Are evolving standards of decency the standards of decency expressed in legislation throughout the states, or are they whatever standards the judges believe are decent? What is required to make a law narrowly tailored?

Many of these terms can't be defined precisely, and that may be fine. But if you find that they are too vague, you might ask yourself whether they really help your argument; and in any case, trying to give a clarifying definition can help you refine your argument, both for your own understanding and to make the argument easier for readers to follow.

8. Undefended assertions, and "arguably" / "raises concerns"

If you make an assertion, you need to be sure that it's adequately defended (unless it's obvious). Including "arguably" or "it can be argued that" isn't enough: It acknowledges that the statement is controversial, but it doesn't explain why the reader should accept your side of the controversy. If you think something is arguably true, then give the argument, and explain why it's better than the counterargument.

Likewise, it isn't enough to argue that some proposal "raises constitutional concerns" or "is troubling." If you think the proposal is actually unconstitutional, or actually unsound, explain why you think so.* It's not enough just to hint at the possibility, and to expect this hint to carry your argument.

* * *

All these points reinforce the need to go through many drafts, looking at your arguments with new eyes. The only way you can catch problems like these—or the writing errors mentioned below—is by repeatedly and carefully reading your own work.

I. Things to Look for: Writing

1. Paragraphs without a common theme

Each paragraph should be about one main thought. The first sentence should usually express that thought; that's why it's often called the topic sentence. The other sentences should fit with that thought. If they don't, then they belong in a different paragraph.

2. Long paragraphs

Avoid long paragraphs. People tend to digest one paragraph at a time, and if they see that they'll have to absorb twenty sentences, they

* Showing the existence of "serious questions about the statute's constitutionality" may suffice when you're applying the rule that statutes should, if possible, be construed to avoid such questions. But even there it's not enough to say that the statute raises constitutional concerns—you have to show that they are indeed "serious" concerns.

may get intimidated and skip to the next paragraph.

Writers disagree to some extent about the best average paragraph length. I recommend two to four sentences; others like five or six. But I'm pretty sure that (a) one-sentence paragraphs are usually too choppy, though they're sometimes good when introducing several longer paragraphs, and (b) once you get past six medium-length sentences or four longish ones, you'll be taxing many readers' attention spans.

A paragraph that's about one big thought can often be easily split into several paragraphs, each one about a smaller thought. Try to make sure that the split follows the natural structure of the discussion, and that each of the new paragraphs starts with a topic sentence.

Occasionally, you might want to split a paragraph where there's no natural paragraph break. If, for instance, you have a topic sentence followed by half a dozen sentence-long illustrations, you could split the paragraph just to give the reader a breather. Look over the result, though, and make sure that it doesn't seem too disconnected.

3. Inadequate connections between paragraphs

Each paragraph should be logically linked to the one before it. When the reader starts reading a paragraph, he should understand its relationship to the preceding one.

This doesn't mean that you must start each paragraph with a transition like "Moreover" or "On the other hand." Transitions are sometimes helpful, but not always, and sometimes they're distracting. For instance, this paragraph is connected to the preceding one without an explicit transition—the pronoun "This" does the job.

Repeating a word or a concept from the previous paragraph, and especially from the paragraph's last sentence, is another connecting mechanism; so is the word "another." Feel free to change the part of speech when you repeat a word this way, for instance by using "connecting" in the first sentence of a paragraph to link back to "connected" in the last sentence of the previous one. Such links help you take the reader smoothly from thought to thought, making it clear how the thoughts fit.[14]

4. Redundancy

When you see two sentences that express similar thoughts, try to

eliminate one, or part of one. If you're intentionally restating a thought to make it clearer, try to make it clear the first time you say it. The phrase "in other words," in particular, is a clue that the first words you used aren't that good. Repetition annoys busy readers who want to get to the point quickly, and it can also confuse readers: If the second sentence makes the same point as the first sentence but uses slightly different words to do it, some readers will assume that the two sentences must say something different, and spend time looking for this nonexistent difference.

Likewise, avoid phrases such as "any and all," "null and void," or "cease and desist," in which two words linked by an "and" or an "or" are, practically speaking, identical. Except when the redundant phrase has legal significance (for instance, "a cease-and-desist letter"), eliminate one of the components (making it "all," "void," or "cease," or, better yet, "stop").

These redundant couples are often clichés, but writers also often create their own, such as "the new nouns generally tend to be more abstract and conceptual than the concrete actions and attributes that they replace" (a phrase from an earlier draft of this book). "Abstract" and "conceptual" might sometimes mean subtly different things, but not here. "Abstract" alone will do fine, and will keep the reader from wondering which nouns are more abstract and which ones are more conceptual.

Repetition is sometimes rhetorically useful for stressing an important point, and sometimes actually clarifies things. The introduction and the conclusion of an article, for instance, necessarily repeat some of what the body of the article says. Usually, though, redundancy makes your writing less effective.

5. Unnecessary introductory clauses

"*It should be mentioned that* knowledgeable gun owners already know that ...." "*In having researched the implications of the act,* I would recommend that ...." The italicized phrases add nothing: They're throat-clearing—things people say before they start getting to the point. Delete them.

6. Other unnecessary phrases

More broadly, each sentence and each clause should make some specific point that's useful to your argument. Consider one example from a student paper: "The state legislature should reject this proposal because it is the wrong solution." What extra information does "because it is the wrong solution" convey to the reader?

Likewise, consider another example:

> Given the large number of accidental firearms injuries among young people that occur annually in this country, everyone would agree that firearms safety is a matter of great public concern.

On that level of generality, everyone does agree—to the point that the sentence adds nothing substantively, and is such an obvious platitude that it adds nothing rhetorically either.

Either delete the sentence or make it more concrete. For example, it turns out that in 2000, about 85 children age fourteen or under died in firearms accidents in the U.S., and about 1850 were nonfatally injured in such accidents (about 1100 were treated and released, while about 750 were transferred or hospitalized).[15] If you replace the vague phrase "large number" with the specific number, you'll be saying something that might be news to many readers, and you'll be giving readers a better idea of just how concerned they should be about this.

Finally, consider these opening paragraphs of a draft article on campaign finance law (also mentioned on p. 41 above):

> Campaign speech has long been a controversial topic among scholars and commentators. Much attention has been devoted to the Supreme Court's treatment of individual expenditures, contributions and spending in *Buckley v. Valeo*. Congress' recent consideration of campaign finance reform provides an ideal opportunity to revisit the 1976 Supreme Court decision that addressed the free speech implications of limits on federal campaign-related activities.
>
> This essay briefly discusses the effects of such limits on individual speech, the disproportionate treatment of speech by the media and justifications presented by several members of the Court in the 2000 decision, *Nixon v. Shrink Missouri Government PAC*.
>
> Let me begin by giving a concrete situation. Imagine you are outraged about a particular candidate's stand on something. [More concrete details follow, aimed at showing that there's a basic First Amendment right to spend money to express your views about candidates.] ...

What does the first sentence add? Very little: Virtually all readers will already know how controversial the subject is. The same goes for the second sentence. The third sentence says something nontrivial, by suggesting that this article is relevant to "Congress' recent consideration of campaign finance reform," but most of the rest of the sentence isn't helpful either.

That's a lot of unnecessary generalities—and at the very beginning of the article, which sets the tone for what follows. Here's an alternative, with the surplusage cut out:

> Imagine you are outraged about a particular candidate's stand on something. [More concrete details] ...
>
> May the law restrict this sort of speech, in the name of preventing corruption or equalizing people's voices? May the law allow the media to editorialize about elections while limiting speech by others? These questions are made especially relevant by the enactment of the new campaign finance bill. This essay will briefly discuss them, with a special focus on the Justices' arguments in *Nixon v. Shrink Missouri Government PAC*.

Not perfect—the last two sentences are clunkier than they should be—but at least each part adds something to the argument.

7. Needless tangential detail

Organize your narration around the needs of your argument, rather than around the internal structure of the facts that you've learned while doing your research.

When you've learned a lot about a subject in writing your paper, it's tempting to just put all the facts down on paper using whatever internal structure (for instance, chronological) the facts have. Say you read all the Supreme Court cases related to some doctrine that you'll apply; it's tempting to describe each of those cases. Or say you're writing about the legal regulation of nonlethal weapons, such as pepper sprays: It's tempting to explain in detail how the weapons work, the chemicals they use, the subtle differences between the chemicals, and the like.

But not all this detail will be important to your claim, and readers will see much of it as a needless (and often boring) tangent. First, focus on what the readers need to know, and cut the remainder.

Second, articulate what's left in ways that are most useful to readers. Thus, for instance, if a state law limits pepper sprays to 2½ ounces,

don't focus on that—instead, figure out how many defensive uses that amounts to (one? five? ten?). The reader wants to know what the restriction will do in practice, not how it's defined as a matter of physics or chemistry.

8. Legalese/bureaucratese

Write like normal people speak, not like lawyers or bureaucrats tend to write. Don't write "Opposition to the bill is needed on the grounds that the means will produce little or no desirable ends." Saying "We should oppose the bill because it won't [fill in the goal, e.g., reduce violence]," "Legislators should oppose the bill because it won't reduce violence," "The proposal won't reduce violence," or even the "The proposal won't do what it's supposed to do" would make the same point in plain English.

Likewise, replace "Guns have a far greater utilitarian value than ..." with "Guns are far more useful than ...." Instead of "could negatively affect the accessibility of handguns," write "could make handguns less accessible." Replace "made through this form of behavior" with "made this way."

a. These three examples all illustrate one common cause of legalese: "nominalization"—turning verbs, adjectives, and adverbs into nouns or noun phrases. The verb-heavy phrase "we *should oppose*" becomes the noun-focused "*opposition* to the bill is needed." The adverb phrase "are *far more useful than*" becomes the noun-focused "have a *far greater utilitarian value* than." The adjective phrase "could make handguns *less accessible*" becomes the noun-focused "could negatively affect *the accessibility* of handguns."

Nominalization tends to add words, which makes text longer, and to add prepositional or verb phrases, which makes text more complex. It also tends to make the writing less concrete and thus less lively, because the new nouns ("opposition," "value," and "accessibility") generally tend to be more abstract than the concrete actions ("should oppose") and attributes ("more useful" or "less accessible") that they replace. If you see an abstract noun, ask whether you can replace it with the concrete verb, adjective, or adverb that the noun phrase embodies.

b. Legal writers also tend to use long phrases instead of their short synonyms. Instead of "many," lawyers often write "a large number of." "Near" becomes "in close proximity to." "The legislature" turns into "the

legislative branch of government."

Sometimes the long phrases might seem to add some important nuance: For instance, a person may write "the legislative branch of government" to highlight the distinction between the legislature and other branches of government. But even then, simpler versions can often express the nuance equally well; referring to "the executive," "the legislature," and "the judiciary" probably highlights the distinction between the branches equally well. If you see a formal-sounding phrase that seems to represent just one basic concept, ask whether one word could do the job instead.

c. Some argue that formal words and legal clichés add dignity to prose. And some prose does sound better when it's more formal—"Four score and seven years ago" sounds better in the Gettysburg Address than "Eighty-seven years ago" or "In 1776."

But the Gettysburg Address was an oration in honor of fallen soldiers; Lincoln had a captive audience that was disposed to agree with him; and the entire address was only three minutes long.[16] Most law review articles won't satisfy any of these criteria. For practical reasons, they should be clear and easy to read; and while you'd like them to seem intellectually hefty and sometimes even emotionally stirring, formal language isn't likely to give you that.

So as you read your draft, ask yourself for each sentence: Do ordinary people talk this way? Would I ever hear this from an articulate nonlawyer friend over dinner? "Opposition to the bill is needed on the grounds that the means will produce little or no desirable ends" flunks this test.

If you really learn this rule, you'll be set. But in the meantime, Appendix I (p. 261) gives some tips on particular words and phrases you might want to avoid; and if you go to *http://volokh.com/writing*, you can download a macro that will automatically identify for you most of the words and phrases listed in the Appendix.

9. Unnecessary abstractions

You should make your argument using words that clearly describe the real problems that people face, rather than talking about the problems in abstract terms (even if the abstract terms aren't especially legalese). Consider the following phrases:

> ... when law enforcement is unavailable.

> Considering the amount of violence that is connected with guns ...
>
> ... will have a positive effect.

They are written in fairly plain English, and aren't hard to understand—but they make their points through abstract terms such as "unavailable," "violence," and "positive effect," and the circumlocution "law enforcement."

When you want someone to protect you, whom do you want? Your visceral, real-life answer will be "the police," not "law enforcement." What do you want them to do? Your normal answer will be "come in time," not "be available." "When the police can't come in time" quickly engages the reader's practical concerns; "when law enforcement is unavailable" doesn't. (I assume that the "[come in time] to prevent a killing, rape, or robbery" is implicit from context; if it isn't, then some such phrase should be included.)

Likewise, instead of "Considering the amount of violence that is connected with guns," try "Considering how many people are killed, injured, or threatened with guns." Killings, injuries, and threats are what people *really* worry about; "violence" is just the abstract term for that. Readers will intellectually understand what "violence" means, but they won't be as engaged by it as they would be by "killed, injured, or threatened."

Instead of "will have a positive effect," describe the actual effect, for instance "will prevent many murders and suicides." No one wants "positive effects" in the abstract; they want specific, concrete benefits, and if you explain the benefits, people will be more persuaded.

One more example:

> The waiting period provides a vital time frame, which allows an individual the time to reconsider their actions and consequently, lives will be saved.

This sentence contains several writing glitches; "individual" is legalese for "person," "a vital time frame" is vague, and "their" is plural while "individual" is singular. But the deeper problem is that the sentence is written using unnecessary abstractions. A better formulation would be:

> The waiting period can prevent impulsive murders and suicides, by giving people time to calm down [optional: and reconsider their plans].

Instead of the general "time to reconsider their actions" and "lives will be saved," this explains concretely which actions (impulsive murders and suicides) will be reconsidered and which lives will be saved. It provides more substantive details, describes a concrete scenario for the

reader (an impulsive person needs to calm down, or else he'll commit murder or suicide), and thus makes the argument more persuasive.

There are two situations in which the concrete is not as good as the abstract. First, sometimes you need to use a term that's more abstract but more precise. For instance, "murder" is usually a better, more concrete term than "homicide," but if you are talking about a study that measures all homicides (including manslaughter, justifiable homicide, and excusable homicide), you need to use the more accurate term.

Second, sometimes you intentionally want to soften the emotional force of a claim, either because you fear that the issue may be too viscerally engaging (part of the reason that some articles use "sexual assault" instead of "rape"), or because you're describing the other side's argument. This second reason is not entirely praiseworthy, but it may be tolerable; you have an obligation to describe the counterarguments honestly, thoroughly, and clearly, but you need not frame them in the most emotionally forceful way possible.

But these are exceptions. The rule is to talk about what actually matters to the reader (the police not coming in time) and not about abstractions (law enforcement being unavailable).

10. Passive voice

Many people recommend that you turn the passive voice—"The action was done by this person" (the object was verbed by the subject) or just "The action was done"—into the active voice, "This person did this action" (the subject verbed the object).

This is generally good advice. Passive voice often makes writing less direct: "Passive voice should be avoided by you" is worse than "Avoid the passive voice." It also sometimes conceals responsibility, as in the famous "Mistakes were made" used as a substitute for "We made mistakes."

But if your discussion focuses more on the object than on the subject (the actor), you might want to use the passive voice, which has a similar focus. If you're writing about the USA Patriot Act, for instance, the passive sentence "The Act was adopted shortly after the September 11 attacks" may be better than the active "Congress adopted the Act shortly after the September 11 attacks." The passive voice properly focuses the discussion on the Act, rather than on Congress.

11. Clichés

Generally avoid overused phrases, such as (to borrow examples that I've cut from drafts of this book) "more than meets the eye," "law of the land," "flat wrong," "time and time again," "mix and match," "done to death," "abandon ship," "chock full," or "go back to square one."

These phrases may seem like colorful intensifiers that catch the reader's attention; and sometimes they indeed do that, which is why the advice "avoid clichés" sometimes seems overstated. But the advice is usually sound. These phrases were once (I almost wrote "once upon a time") novel and vivid, and added flair to people's writing. But overuse has drained most clichés of this capacity. And because authors tend to overestimate their own wittiness, they often think that a cliché will add color even when it really doesn't.

There's thus little advantage to using clichés, and there are disadvantages. Some clichés annoy some readers; and almost all clichés make sentences longer and more complex. Each one may not make much difference, but the extra mental translation that they require can add up. And clichés keep you from inventing your own original imagery, which would be helpful precisely because it's fresh to the reader.

12. Figurative phrases

Most clichés and all metaphors (see p. 112) are figurative phrases: They use words and phrases that mean something other than their literal meaning (for instance, "like a bull in a china shop"). Figurative phrasing is sometimes helpful, but it's often dangerous precisely because it uses terms in their nonliteral sense. You should use figurative terms sparingly, and you should always be aware of the literal meaning as well as the figurative when you do use them.

a. The first danger of the figurative was mentioned in the discussion of metaphors: Writers sometimes *assume that the figurative usage will do the work of persuading people or explaining the proposal*. But "allowing courts to decide this would be like putting a bull in a china shop" is not a complete argument; "courts should balance the freedom of speech and the need for individual privacy" is not a complete proposal. They become complete only when the writer answers the underlying questions: Exactly why are courts incompetent at deciding this? Exactly how should courts deal with speech that reveals private information about

others?

If you had used literal language, e.g., "courts aren't going to do a good job of deciding questions like this," you'd have seen the need to flesh out the argument. But figurative language, by hiding the literal meaning, can also hide this need.

b. The second danger is *forgetting that the figurative phrase has two different meanings*, and using the figurative meaning without realizing that the literal meaning will distract or confuse the reader.

i. *Mixed metaphors*, such as "the political equation was thus saturated with kerosene," are one example of this.[17] Standing alone, "the political equation" and "saturated with kerosene" would just convey their figurative meanings, and their literal meanings would be largely ignored. But when you put them together, readers will notice their incompatible literal meanings, and be distracted (and unintentionally amused). My favorite, possibly apocryphal, example: "This field of research is so virginal that no human eye has ever set foot in it."[18]

ii. Even a single figurative usage can have its literal meaning *unintentionally highlighted by surrounding concepts*: "The felony murder rule has been done to death in the literature" is either a weak (and macabre) intentional joke or a weak unintentional one. "Done to death" on its own just conveys its figurative meaning of "exhaustively covered," but when it's used while discussing felony murder, readers will think of the literal meaning as well, and be distracted. The distraction might be justified if you think the joke is funny enough, but usually it isn't.

iii. Figurative usages that allude to some literary work or historical practice may *clash with their original meaning*. To "decimate," for instance, originally meant to kill every tenth person as a collective punishment (hence the joke that "You can tell the ancient Romans were tough—in their language, 'to kill every tenth person as a collective punishment' was one word"). The figurative meaning, which is "to dramatically reduce," is now well established, but some people are still reminded of the old usage, which can either distract or annoy them.

Likewise, "East is East and West is West, and never the twain shall meet" is sometimes used to suggest that two cultures are irreconcilable. But Kipling's poem continues with "but there is neither East nor West, Border, nor Breed, nor Birth / When two strong men stand face to face, tho' they come from the ends of the earth." People who are familiar with the poem will thus be reminded of the exact opposite of what the person who is quoting the "East is East" phrase is asserting.

You might think that such objections are pedantic: After all, you're using the modern meaning, not the original one. But when a writer chooses to express the modern meaning using a literary or historical allusion, he brings the literary or historical origin to the minds of those readers who know the origin. And if that original meaning distracts the reader from the actual meaning that the writer wanted to evoke, that's the writer's fault.

c. Figurative usages are *often misused*, because people don't think about (or don't understand) the literal meaning. "Back to ground zero," for instance, is often used instead of "back to square one." "Ground zero" is the location where a bomb is detonated, not the first step of a long task. But the similarity of "ground zero" and "square one," coupled with writers' lack of attention to the terms' literal meanings, makes it easy to confuse the two.

Likewise, "free rein," "toe the line," and "tough row to hoe" are often miswritten as "free reign," "tow the line," and "tough road to hoe." Even writers who would rarely misspell a literally used word may fall into these traps for figurative phrases, because the phrases' literal origins—which provide an important clue about their spelling—are often forgotten.

d. Writers are often *tempted into using figurative phrases* even when the phrase isn't quite right for the occasion. Thus, "raises the question" often becomes "begs the question"; "begs the question" traditionally refers to the fallacy of assuming the very point that you're trying to prove, but because the phrase seems so colorful, many people use it in a broader, and incorrect, sense. Likewise, a person's changing his behavior, even incrementally, becomes "the leopard changing its spots," even though the latter phrase generally refers not to all changes but specifically to radical ones.

So if you think some figurative phrase can make a point more vivid, use it, but only after considering both (1) whether the phrase really adds something, and (2) whether the literal meaning of the phrase might weaken your point more than the figurative enhances it. And always second-guess yourself whenever you use a figurative term unintentionally; many such uses prove to be unhelpful.

Finally, never, ever use the word "literally" when you mean "figuratively," as in "[T]he number of lawyers in the United States has literally exploded over the last 53 years." *Literally* exploded?

13. Literary or pop culture allusions

Allusions to pop songs, great literature, classical mythology, or other works pose some of the same risks as metaphors. They seem appealing, because they promise to make the work more lively, erudite, or amusing. But they often come across as forced and distracting. Sometimes they're counterproductive because they're not precisely on point, but the author was blinded to this by his joy in making a little joke. They're often cliché. And sometimes they are obscure enough that they may confuse or alienate readers, or else require an explanation that further distracts the reader with irrelevancies.

Some allusions are good, because they vividly—and often humorously—capture your point. You just need to look suspiciously at every allusion you use, to make sure you're using it for the right reason.

Alex Long's *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing* illustrates this well:

> Take ... the following passage from an unpublished federal opinion:
>
> > The Beatles once sang about the long and winding road. This 1992 case has definitely walked down it, but at the end of the day, the plaintiffs and their counsel were singing the Pink Floyd anthem "Another Brick in the Wall" after consistently banging their collective heads against a popular procedural wall—Northern District of Illinois Local Rule 12 governing the briefing and submission of summary judgment motions.
>
> The court's use of the "Long and Winding Road" and "procedural wall" metaphors coupled with the reference to Pink Floyd in this instance is counterproductive [because, among other things,] ... the court's use of metaphor does little to assist the reader in understanding the court's meaning in any meaningful way. If one of the purposes of metaphors is to allow people "to understand one phenomenon in relationship to another and to illuminate some salient details while shading others," the "Long and Winding Road" metaphor just barely serves this purpose.
>
> Litigation often takes a lot of twists and turns and may take a long time. We get it. There is nothing particularly wrong with [t]he Beatles metaphor; however, if one assumes that one of the purposes of metaphors is to make a point in a more concise manner, then the inclusion of the metaphor fails this purpose....
>
> Contrast that example with the California courts' use of the "you don't need a weatherman to know which way the wind blows" metaphor used to explain under what circumstances expert testimony is required. [This observation has become almost boilerplate included in the decisions of the California appellate courts when ruling on when ... expert testimony before a jury is required. According to a California appellate court, Dylan states "the correct rule," and the California courts are simply in harmony with his statement of the law.]
>
> The metaphor is effective in that it serves the purpose of metaphors by "making abstract concepts more concrete" and aids in understanding; the court's use of it is also pretty darn funny. Both the inherent truthfulness and applicability of Dylan's statement are so spot-on that even one who dislikes or is ambivalent toward Dylan would be hard pressed to quibble about a court's use of the phrase.

This is precisely right: The "long and winding road" and "brick in the wall" allusions add no support to the argument. Maybe they'll amuse some readers, but they're probably more likely to annoy, precisely because they're needless distractions.

But the "you don't need a weatherman" line does support the argument. It crisply captures a truth (we can understand some things without calling on experts) that's closely connected to the legal question at hand. This makes the author's point more vivid, and more likely to come across as witty.

The same also applies to epigraphs: Use them only after you've thought hard about whether the quote is genuinely apt.

14. Abbreviations

Abbreviations (such as SSA, FIFO, DBA, TLA, and so on) tend to make a work less accessible, at least to readers who aren't already thoroughly familiar with the abbreviations. This is especially so if a reader sees several such abbreviations on the same page.

Some abbreviations are unavoidable, and are so standard that most readers won't really notice them; everyone knows about the EPA and the FCC, and most people who read about religious freedom law know about RFRA (the Religious Freedom Restoration Act). Calling these entities by something other than their abbreviations will be jarring and unnecessarily wordy.

But don't create your own abbreviations, and try to avoid using preexisting abbreviations that are relatively unfamiliar to most readers. For instance, if you're writing about the Gun Free School Zones Act, don't call it GFSZA—call it "the Act," since it's probably the only Act you'll be discussing in detail. If you're talking about slippery slope ar-

guments, don't call them SSAs; spell out the phrase, or just say "such arguments" if your meaning is clear from context. Shorter is usually better, but not when you get brevity by making the article seem forbidding to casual readers.

15. Word choice errors

a. *Simple error.* "The police already have alternate counts to chase criminals"—not quite right. "Citizens' suspicions of intrusive gun control laws are at a height"; one can see what the author is getting at, but "at a height" is not the best phrase here.

b. *Inattentiveness to usage.* A more subtle problem is inattentiveness to the way words are normally used. Consider the phrase "the crime is not that serious (it is only negligent)." There's no inherent reason that we can't say "negligent crimes"; after all, we say "negligent homicide" or "negligent misrepresentation." But people don't normally use this phrase.

Likewise, the phrase "crimes done in the heat of passion" is not logically wrong, but it is unidiomatic—crimes are generally "committed" rather than "done," and readers may find "crimes done" to be odd and jarring. Ask yourself, as you do when looking for legalese: "Do people actually talk this way?"

c. *Inattentiveness to literal meaning.* Consider the sentence "Firearms are one of the most lethal forms of suicide." It's clear what this means, but if you look closely, it's not literally accurate, for two reasons. First, all *suicide* (as opposed to attempts to commit suicide) is by definition completely lethal. Second, firearms are a *means* to commit suicide, not a form of suicide. "Firearms are one of the most lethal means for committing suicide" would be better, though "Suicide attempts with guns are especially likely to succeed" might be more accurate still.

This sort of objection may be pedantic, but many readers will make it. Consciously or not, some people may see such logical errors as evidence of an illogical mind; and sometimes (though not in this example), the errors will make the sentence ambiguous or hard to understand. True, English is full of illogical idioms ("ice cream" isn't made of ice—"iced cream" would have been more logical), but outside these established idioms, you're better off using words as logically as possible.

d. *Errors obscured by intervening words.* Word choice errors are particularly likely if the two parts of the unidiomatic or illogical phrase are

separated by other words. In "crimes done in the heat of passion," the unidiomatic usage ("crimes done") is pretty clear; but in "crimes which would have been done in the heat of passion," it's less obvious. There's no solution for this except careful proofreading.

J. Things to Look for: Rhetoric

1. Unduly harsh criticism

Be understated in your criticisms, even if they're well founded. Don't call your opponents' arguments "fraudulent," "nonsense," "ridiculous," "silly," or even "egregiously wrong." Use "mistaken," "unsound," "erroneous," or other mild criticisms instead. People will get your message, and will be more disposed to accept it precisely because it's understated.

Why?

(a) Overstating your argument *raises your burden of proof.* Call an argument "fraudulent," and skeptical readers might say "Wait, is it really fraudulent, or could it just be an honest error?"; and this will distract them from your more important claim, which is that the argument is just wrong. Likewise, call the argument "irrational," and skeptical readers may try to find some reasonableness in it. You don't want to weaken your claims by making unproven and unnecessary allegations.

(b) *No one likes a bully.* Excessive harshness may alienate readers and make them sympathize with your adversaries.

(c) *Invective often hides lack of substance.* Readers realize this, and become suspicious when they hear overheated rhetoric.

(d) *Readers are less likely to tolerate harsh criticism by juniors*—such as law students or young lawyers—than similar criticism by respected scholars. By all means, pick fights with the Big Guns; your professor and other readers will admire your pluck. But be scrupulously polite to the people you criticize: A polite upstart is more tolerated than a rude one.

(e) There's *no need to make unnecessary enemies.* When you're applying for a job, and Justice X's former law clerk is reading your article, you'll be glad that you called Justice X's arguments

"mistaken" rather than "stupid." This shouldn't stop you from expressing disagreement; people respect honest disagreement. But they don't respect rudeness, or even borderline rudeness, especially rudeness to people they know and like.

(f) *If you're ultimately proven wrong*, even in part, it's much easier to gracefully backpedal from a mistaken assertion that some argument "seems unsound" than from a mistaken assertion that the argument is "idiotic."

Follow Prof. Dan Markel's advice: "Anytime I'm tempted to write out of rage that someone's argument is hopelessly misguided or fabulously wrong, I try to remember how much I cringe when my own work is criticized. I drop adverbs and instead use locutions such as [']the claims advanced in the article 'seem mistaken or inaccurate' for the following reasons.['] ... This helps focus on[] what Michael Walzer wisely described[as] the task of 'getting the arguments right.' [Scholarship should be about that, not] about making anyone look foolish or wicked."[19]

2. Personalized criticism

Attack arguments, not people. Most readers will react better to "this argument is wrong because ..." than to "Volokh is wrong because ...." Likewise, when you're criticizing an argument, don't call it Volokh's argument. Label it by name ("the cost-lowering slippery slope argument") or just say "the argument," if it's clear from context which argument you're referring to. Of course, properly attribute your adversary's argument, but do it in the footnotes, or with no more than one named reference in the text.

This sort of circumlocution helps readers feel that your disagreements are substantive, not personal. There's nothing inherently *rude* about criticizing a person's argument using his name, but such criticism tends to come across as unduly combative, even when it's not intended that way. And the more substantively devastating your criticism is, the more you should keep the devastated author's name out of it.

3. Caricatured criticism

Prof. Dan Markel puts it well:

> [Avoid] the drive-by characterization of or criticism against a "school of thought." One often reads something like: retributivists believe X, or utilitarians believe Y, or [critical legal studies scholars] think Q and originalists think R....
>
> [T]his is largely unhelpful, except in very introductory materials. Far better to name names and cite particular works of scholarship than to make vague generalizations that are more often accepted by critics of the particular school of thought but rarely accepted by adherents to the relevant school of thought.
>
> Relatedly, avoid quoting a critic of X when trying to explain what X is. Better to find an adherent of X to cite and quote than someone who thinks X is wrong or inaccurate .... [T]he critic of X is less invested in actually describing X accurately than an adherent of X is.

And he offers a good bottom-line test as well: "Could I show [my work] to the objects of criticism and be assured that they will think I've acted fairly, if not charitably, toward their work[?]" Always ask yourself that.[20]

K. Proofreading

Words are the lawyer's most important tools. If you use the wrong word, or make a minor grammar, spelling, or punctuation error, you come across as a craftsman who doesn't know how to use his tools. You lose credibility, even if the substance of what you're saying is sound.

Thus, as you read your article in each editing pass, ask yourself the following questions:

1. (For each sentence:) What information does this sentence communicate to readers that they *don't already know*?
2. (For each sentence:) Has this information—or even part of it—*already been communicated by a previous sentence*?
3. (For each sentence:) Are this sentence and the previous sentence *so closely related* that part of the first sentence is repeated in this one?
4. (For each word, phrase, or sentence:) Can I *eliminate this without changing the meaning*?*

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* The careful reader may have noticed that these questions, aimed largely at finding redundancy, are themselves redundant. This is intentional: When you are looking for things that are often overlooked—such as redundancies or other writing problems—it's often useful to look for them using several slightly different approaches. This, though, is

5. (For each phrase in a sentence:) Is this how *normal people talk*?
6. (For each word:) Does this word communicate *exactly what I want it to*?
7. (For each noun:) *Should this noun be a verb, adjective, or adverb* instead?

For more tips, check out Bruce Ross–Larson's *Edit Yourself*, which focuses mostly on word and sentence edits; C. Edward Good's *Mightier than the Sword* and *A Grammar Book for You and I*; Bryan Garner's *Elements of Legal Style*; and Strunk & White's *The Elements of Style*, the classic general writing guide.

L. *Editing: Three Exercises*

1. Basic editing

Practice these suggestions using three concrete examples. The first two are paragraphs from real seminar papers written in response to the following assignment:

> Your boss, Senator Elaine Mandel, is a member of the State Senate Committee on the Judiciary. The Committee will shortly consider the proposed Child Firearms Safety Act, which states that "Any person who lives in the same household as a minor and who possesses a handgun shall store the handgun unloaded and in a locked container." Please write a short memo advising the Senator whether she should vote for the law.

Here are the opening paragraphs from the two papers:

> The Child Firearm Safety Act as currently written is a well intentioned piece of legislation which will likely have little effect on the incidence of minors accidentally killed by handguns. However, with some critical modifications the act could play a significant role in lowering the number of minors lost to handgun accidents each year. These modifications should include: compelling either that the gun be kept in a locked container *or* unloaded; the inclusion of long guns in the Act; and making violation of the Act a felony offense.

and

> The proposed Child Firearms Safety Act (the "bill") is an inconsequential piece of legislation. Aside from the significant political impact of

one of the rare situations where redundancy is helpful.

> the bill, it carries little weight and makes little difference. Despite public misconceptions, the few benefits of the bill, notably the probable slight decrease in the number of childhood gun accidents, do not exceed the drawbacks, such as the inaccessibility of guns during a home invasion and loss of civil liberties. Therefore, unless some strong amendments are made to the bill, I recommend that you oppose the bill.

Try rewriting each to make it clearer and about 50% shorter; I give some possible answers in Appendix II.A.1, p. 269.

2. Editing for concreteness

Consider also this paragraph; assume that it's the first paragraph in an article on laws prohibiting the wearing of masks in public:

> The existence of antimask laws poses difficult questions of constitutional law. We know that the freedom of speech is one of our most cherished rights, especially when there is a danger that the free expression of unpopular speakers would be deterred by the fear of negative consequences. And yet the prevention of crime, including crime facilitated by the wearing of masks, must surely be ranked as one of the more compelling of the possible government interests. The public understandably wants to avoid the harm to property, persons, and the social fabric that may flow from such crime.

The purpose of the antimask laws, as the paragraph suggests, is to prevent crime: Anonymity can make it easier for people to get away with crimes; masks facilitate anonymity; so therefore banning masks should (at least in some circumstances) help prevent crime. On the other hand, some people will be reluctant to express unpopular views unless they can do so anonymously, so antimask laws deter some unpopular speech.

This paragraph is much better written than the preceding two—and yet it's still too abstract, and too full of unhelpful generalities. Rewrite it to make it more concrete, clear, and vivid. Feel free to cut material and add material, if you think that the changes will improve the paragraph. A possible answer is in Appendix II.A.2, p. 274.